**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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| **Illinois Power Agency** | **:** | |
| | **:** | **13-0546** |
| **Petition for Approval of the 2014** | **:** | |
| **IPA Procurement Plan pursuant to** | **:** | |
| **Section 16-111.5(d)(4) of the Public** | **:** | |
| **Utilities Act.** | **:** | |

**PROPOSED ORDER ON REHEARING**

DATED: May 12, 2014

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**PROPOSED ORDER ON REHEARING**

By the Commission:

## I. BACKGROUND

As set forth more specifically therein, Section 16-111.5(d)(2) of the Public Utilities Act ("PUA"), 220 ILCS 5/1-101 et seq., requires the Illinois Power Agency ("IPA") to prepare a power procurement plan ("Draft Plan"), which is to be posted on the IPA and Illinois Commerce Commission ("Commission") websites. Among other things, the purpose of the power procurement plan is to secure electricity commodity and associated transmission services to meet the needs of eligible retail customers in the service areas of Commonwealth Edison Company ("ComEd") and Ameren Illinois Company d/b/a Ameren Illinois ("AIC" or "Ameren"). Section 16-111.5(d)(2) does not require that the Draft Plan be docketed by the Commission. Any comments on the Draft Plan are to be submitted to the IPA, for review by the IPA. The PUA requires the IPA to make revisions as necessary based on the comments submitted to it, and then to file the plan as revised with the Commission. As such, the only plan the IPA is required to formally file with the Commission, and the one that is actually before the Commission for its review in this proceeding, is the one containing the IPA's post-comment revisions. On September 30, 2013, the IPA filed with the Commission its sixth annual power procurement plan ("Plan," "IPA Plan" or "IPA 2014 Procurement Plan") initiating this proceeding.

The Commission entered a Final Order in this proceeding on December 18, 2013. On January 21, 2014, the Retail Suppliers ("RS") filed an Application for Rehearing and Reconsideration. On February 5, 2014, the Commission granted the RS Application for Rehearing and Reconsideration.

At page 181 of its December 18, 2013 Order in this proceeding, the Commission stated:

> While the Commission fully understands the RS incentives, it is not clear how or why shifting costs from the suppliers to the utilities' customers is fair or in the public interest. Should the RS provide the Commission with

sufficient evidence to prove this proposal would not harm utility customers and would be in the public interest, the Commission may be inclined to revisit the issue.

The scope of rehearing is to consider proposals relating to the implementation of curtailments of purchases under the RS' long-term power purchase agreements ("LTPPAs") with the electric utilities and the purchase price for renewable energy credits ("RECs") that are curtailed under the contracts but are then purchased by the electric utilities using alternative compliance payment ("ACP") funds accumulated in respect of sales to their customers served under hourly pricing tariffs ("hourly ACP funds") and by the IPA using funds accumulated in the Renewable Energy Resources Fund ("RERF").

On February 19, 2014, a prehearing conference was held by the Chief Administrative Law Judge of the Commission at the Commission's Offices in Springfield, Illinois. Appearances were entered by counsel on behalf of the IPA, Ameren, the RS, Commission Staff ("Staff"), ComEd, Wind on the Wires ("WOW"), and the People of the State of Illinois ("AG"). On April 10, 2014 an evidentiary hearing was conducted. At the conclusion of the evidentiary hearing, the record was marked "Heard and Taken."

On rehearing, the RS presented the direct and rebuttal testimony of Craig A. Gordon, Vice President of Sales and Marketing at Invenergy LLC ("Invenergy"); the direct and rebuttal testimony of John DiDonato, Vice President of Wind Development for NextEra Energy Resources, LLC ("NextEra"); the direct and rebuttal testimony of Eric Thumma, Director of Policy and Regulatory Affairs for the Iberdrola Renewables LLC; the direct and rebuttal testimony of William A. Whitlock, the Executive Vice President – Eastern Region for EDP Renewables North America LLC ("EDPR"); and the direct and rebuttal testimony of John J. Reed, the Chairman and Chief Executive Officer of Concentric Energy Advisors, Inc. ("Concentric") and CE Capital Advisors, Inc. ("CE Capital").

Ameren presented the direct testimony of Richard L. McCartney, Director, Power Supply Acquisition. The IPA presented the direct testimony of Anthony Star, the Acting Director of the IPA. Staff presented the direct testimony of Richard J. Zuraski, an Economist in the Policy Division of the Public Utilities Bureau. ComEd presented the direct testimony of David Zahakaylo, Director, Energy Procurement of ComEd.

Initial and Reply Briefs were filed by the RS, Ameren, the IPA, Staff, and ComEd. A Proposed Order was served on the parties.

## II. THE RS' POSITION

The RS' primary proposal is that the Commission should direct that, in the event it is determined that a curtailment of purchases is required to avoid exceeding the Renewable Portfolio Standard ("RPS") rate caps, only purchases of RECs under the LTPPAs should be curtailed, and the utilities should continue to settle the energy associated with the curtailed RECs at a price equal to (i) the current year energy price in the 20-year energy price forecast developed by the IPA in connection with the December 2010 procurement event, minus (ii) the current Day-Ahead Hourly Locational Marginal Prices ("DAH-LMPs") in the load zone applicable to the contract. The RS' states for purposes of the issues in this case, the DAH-LMP represents the current wholesale market price of electricity. The RS asserts its primary proposal preserves the customer protections of the statutory RPS rate caps. (RS Initial Brief at 1-2)

The RS' secondary, alternative proposal is that curtailed RECs should be purchased by the utilities, using their accumulated balance of funds from assessing the ACP rate to their customers served on hourly pricing tariffs, referred to as "hourly ACP funds", and by the IPA, using funds in the IPA RERF, at prices equal to the Contract Prices under the LTPPAs less the DAH-LMPs. The RS asserts its secondary proposal also preserves the customer protections of the rate caps. (RS Initial Brief at 2)

Beginning with the 2013-2014 procurement year, the RS states its LTPPAs with ComEd are being curtailed to prevent the RPS rate caps from being exceeded. The RS says the curtailments are occurring due to significant customer shifting from ComEd to alternative retail electric suppliers ("ARES") to an extent not foreseen by either the IPA or the RS at the time of the procurement event in which the LTPPAs were awarded. The RS states it intervened in this case to submit its proposals because the method used to implement the curtailments in 2013-2014 is depriving the suppliers of significant revenue under the LTPPAs, and in particular, deprives the suppliers of more revenue than is necessary to prevent the RPS rate caps from being exceeded. The RS asserts this situation has created uncertainty and risks as to the advisability of entering into long-term supply contracts to serve Illinois' RPS requirements. The RS contends long-term power purchase agreements provide the lowest-cost and most efficient means to finance development of new renewable generation facilities, but claims the uncertainty caused by the LTPPA curtailments and the manner in which they are implemented has made long-term supply agreements uncertain and unreliable from the perspective of potential suppliers to the Illinois market. Since the curtailments began, the RS says new renewable generation projects are not being constructed or placed in operation in Illinois, existing projects in development have been placed on hold, and major developers are shifting their capital and resources to other states where they can achieve stable long-term revenue streams. (RS Initial Brief at 2-3)

The RS argues that its primary proposal will not harm utility customers and is in the public interest. Under the primary proposal, the RS says the utilities' eligible retail customers will continue to receive the full protection of the statutory RPS rate caps based on the procedures previously developed by the IPA, and approved by the Commission, for determining if the rate caps are exceeded. The RS claims charges to customers will be reduced by the amount necessary to prevent the RPS rate caps from being exceeded. In the RS' view, the primary proposal is in the public interest because it will restore revenue certainty to the LTPAAs and thus restore certainty to entering into long-term contracts to provide renewable resources to the Illinois market. The RS contends this in turn will support development of new renewable generation facilities in Illinois, as well as in other states, to serve the Illinois renewables market. The RS avers construction and operation of renewable generation facilities provides environmental benefits, reduces electricity prices and supports price stability for consumers, and provides significant benefits in terms of economic activity for the State and the localities in which the facilities are constructed. (RS Initial Brief at 3-4)

The RS also contends its secondary proposal will not harm utility customers. The RS says the secondary proposal maintains the full protection of the RPS rate caps for utility customers and does not require a change to the current curtailment methodology. The RS claims it also provides for the purchase of curtailed RECs on the same basis as the financial settlement terms of the LTPPAs. Although the secondary proposal would provide a lesser degree of revenue certainty for LTPPA suppliers than would the primary proposal, the RS asserts the secondary proposal is in the public interest. (RS Initial Brief at 4)

According to the RS, the terms of the request for proposal ("RFP") for the 2010 IPA procurement event in which the LTPPAs were awarded required bidders to submit a single bundled Contract Price for RECs plus energy for the first year, which would be escalated at 2% per year over the 20-year term of the contract. To determine the imputed prices of RECs included in the bidders' proposed Contract Prices, the RS says the IPA, its Procurement Administrator, the Procurement Monitor, and Staff developed a confidential forecast of energy prices for each year of the period to be covered by the LTPPAs (the "2010 FEC"). The RS claims the forecasted energy price for a given year was subtracted from the proposed Contract Price to determine the imputed price of RECs to be supplied under an LTPPA. The RS states as required by Section 1-75(c)(1) of the IPA Act and Section 16-111.5(e)(3) of the PUA, the imputed REC price in a bidder's proposed Contract Price was then compared to confidential "benchmark" market prices for RECs determined by the IPA, the Procurement Administrator and Procurement Monitor, and Staff, to determine if the bid was "cost-effective." The RS says this process established imputed REC price and energy price components for each LTPPA. The RS also says all the pricing impact attributable to the renewable aspect of the LTPPA is attributed to the REC component. (RS Initial Brief at 4-5)

The RS states the imputed REC prices in the LTPPAs are also used by the IPA each year to determine if the RPS rate caps will be exceeded and, therefore, if a reduction in purchases under the LTPPAs is necessary to prevent the RPS rate caps from being exceeded. For each utility, the RS says the IPA determines the total dollar amount of RECs contracted for under the utility's LTPPAs, calculated as the sum for all the LTPPAs of the contract quantity of each LTPPA times its imputed REC price. The RS says the IPA also determines the maximum expenditure on RECs allowed by the RPS rate caps, calculated as the utility's projected kilowatt-hour ("kWh") sales to eligible retail customers times the rate cap amount (this total is referred to as the Renewable Resources Budget or "RRB"). If the total dollar amount of RECs contracted for under the LTPPAs exceeds the RRB, then the RS says purchases under the LTPPAs for the year must be reduced to the point at which the dollar amount of RECs to be purchased under the LTPPAs is equal to the RRB. To state this in terms of the cents/kWh rate caps, the RS says if the total dollar amount of RECs contracted for under the LTPPAs (based on the imputed REC prices), divided by the utility's projected kWh sales to eligible retail customers, exceeds 0.18917 cents/kWh for ComEd or 0.18054 cents/kWh for AIC, the amount of RECs to be purchased under the utility's LTPPAs must be reduced to the point at which the REC cost per kWh does not exceed the rate cap amount. (RS Initial Brief at 5-6)

According to the RS, the determination of whether the RPS rate caps are exceeded, and a curtailment of the LTPPAs is needed, is based solely on the imputed REC prices, calculated as the LTPPA Contract Price minus the energy price from the IPA's 2010 FEC. The RS says the calculation does not consider the cost of energy contracted for in the LTPPAs. The RS states for the current year, the curtailments of the ComEd LTPPAs were implemented by reducing purchases of both RECs and the associated electricity under each LTPPA by 18.64%. In the RS' view, this implementation deprives the LTPPA suppliers of significant revenues under the contracts, because the prices in the IPA's 2010 FEC have proven to be higher than current wholesale electricity market prices. The RS notes the LTPPA suppliers are only able to sell the curtailed electricity generated by their facilities into the market at the current wholesale market price. The RS says this results in a revenue shortfall under the LTPPAs equal to the energy price in the 2010 FEC less the current wholesale market price. (RS Initial Brief at 6, Reply Brief at 4-6)

In Docket No. 12-0544, the proceeding concerning the 2013 IPA Plan, in which the LTPPA curtailments for 2013-2014 were approved, the RS states the Commission directed ComEd to use its accumulated hourly ACP funds to buy curtailed RECs, but not curtailed energy, from the LTPPA suppliers. The RS also says because ComEd lacked sufficient accumulated hourly ACP funds to purchase all the curtailed RECs, the IPA has voluntarily used monies in the RERF to purchase the remaining curtailed RECs from the LTPPA suppliers. The RS states the price at which the IPA has purchased curtailed RECs has also been the imputed REC price for each LTPPA. According to the RS, ComEd and the IPA are expected to purchase curtailed RECs on the same basis during the 2014-2015 plan year. The RS asserts that despite the purchases of curtailed RECs at the imputed REC price, the curtailment of purchases of both RECs and the associated energy leaves the suppliers with a revenue shortfall under the LTPPAs equal to the difference between the 2010 FEC price and the current wholesale energy price. (RS Initial Brief at 6-7)

The RS insists adoption of its primary proposal will not harm utility customers, because they will continue to receive the protection of the statutory RPS rate caps and will not be charged amounts that would cause the RPS rate caps to be exceeded. According to the RS, preservation of the protection of the RPS rate caps in Section 1-75(c)(2) of the IPA Act is the appropriate determinant that utility customers will not be harmed. The RS asserts its primary proposal maintains the protection of the RPS rate caps for the utility's eligible retail customers. Under the primary proposal, if the IPA determines that the RPS rate caps will be exceeded in a year, purchases of RECs under the LTPPAs will be curtailed to the extent necessary to stay within the rate caps, but unlike the current curtailment procedure, purchases of energy associated with the curtailed RECs will not be curtailed. The RS proposes for the utility to charge its customers for the energy associated with the curtailed RECs, based on the energy price from the IPA's 2010 FEC. The RS says this is the same price that customers are charged for the contracted energy under the LTPPAs associated with RECs purchases that are not curtailed. The RS proposes for the utility's eligible retail customers to continue to receive the protection of the RPS rate caps, through the curtailment of REC purchases under the LTPPAs. (RS Initial Brief at 8)

The RS argues adoption of the primary proposal will not result in the utility's eligible retail customers being charged amounts for RECs and energy contracted for under the LTPPAs that will cause the RPS rate caps to be exceeded. The RS says the IPA and the Commission determine whether the rate caps will be exceeded based solely on the imputed REC prices under the LTPPAs. Based on the "Appendix K" procedure approved in Docket No. 09-0373, the RS says if the IPA and the Commission determine that the RRB will be exceeded if the full contracted quantity of RECs is purchased, curtailment of the REC component of the LTPPAs is sufficient to bring purchases within the RRB and prevent the RPS rate caps from being exceeded. The RS asserts the energy component of the LTPPAs is not involved in the determination of whether the rate caps are exceeded. (RS Initial Brief at 8-9)

The RS notes other parties contended that the primary proposal should not be adopted because it would result in higher charges to eligible retail customers. The RS says their contention is based on the fact that under the method currently being used to implement curtailments of the LTPPAs, purchases of both RECs and the associated energy are curtailed. The RS contends that the method currently being used should not be assigned the presumption of correctness that the other witnesses seem to assign to it. It is the RS' position that the issue of the appropriate method for implementing curtailments did not receive the attention in Docket No. 12-0544 that it is receiving in this case, and it is specifically the purpose of this rehearing to determine if a different method of implementing curtailments should be adopted. In the RS' view, more importantly, customers pay less under the current method than they would under the RS' primary proposal solely because the current method curtails more payments to the LTPPA suppliers than is necessary to prevent the RPS rate caps from being exceeded. The RS believes other witnesses' position is tantamount to saying that customers are harmed if, in a utility rate case, the Commission increases rates to cover new or increased costs for a legitimate rate base or operating expense item. (RS Initial Brief at 9, Reply Brief at 15-16)

The RS argues the appropriate comparison for determining whether utility customers are harmed by the RS' primary proposal is a comparison of what customers pay if there is no curtailment versus what they pay under the proposal if there is a curtailment. Under the primary proposal, the RS says if it is determined that a curtailment of a utility's LTPPAs is needed, its customers pay less than if there were no curtailment. Specifically, the RS claims the customers are charged less by the amount necessary to prevent the RPS rate caps from being exceeded – purchases of RECs are curtailed to the extent needed to keep the price caps from being exceeded, and the customers are not charged for the curtailed RECs. The RS also claims the utility's customers are charged the same price for the energy associated with curtailed RECs as they are charged for the energy associated with RECs that are not curtailed. (RS Initial Brief at 9-10; Reply Brief at 3-4)

The RS asserts that under some circumstances the primary proposal will reduce costs to eligible retail customers as compared to the current curtailment methodology. The RS says the energy price component of the LTPPAs provides an energy price hedge benefit for the utility's eligible retail customers. The RS states each LTPPA has a fixed Contract Price for the term of the contract, the base year Contract Price plus 2 percent per year escalation. Taking into account the imputed REC price, the RS asserts the LTPPA provides an energy price hedge equal to the projected energy price from the 2010 FEC. In purchasing an energy price hedge, the RS says the buyer is agreeing that the contract price may exceed the current market price at times, in exchange for the protection and certainty that if the market price increases to be greater than the hedge price, the buyer's cost is capped at the hedge price. The RS states the buyer is purchasing insurance against the market price rising above the contract price. (RS Initial Brief at 10-11)

According to the RS, under the LTPPAs, if the DAH-LMP (i.e., the current market price of energy) is higher than the energy price in the 2010 FEC, the utility pays the supplier, and charges the eligible retail customer, only the energy price in the 2010 FEC, not the current market price. The RS says the utility's customers receive a price benefit equal to the difference between the energy price in the 2010 FEC and the higher current wholesale market energy price. (RS Initial Brief at 11)

The RS asserts this has happened in two recent months, January and February (and part of March) 2014. The RS says the DAH-LMPs for those months in the ComEd and Ameren load zones were higher than the energy price in the 2010 FEC. The RS contends that for these periods, ComEd and Ameren customers were charged less than the current market price for energy purchased under the LTPPAs. Had the RS' primary proposal been in effect during this period, the RS says ComEd eligible retail customers also would have been charged less than the current market price for the energy associated with curtailed RECs. In the RS' view, the experience of early 2014 illustrates that its primary proposal is balanced and equitable for utility customers. The RS claims it also demonstrates the value of the energy price hedge embodied in the LTPPA pricing. (RS Initial Brief at 11)

Overall, the RS claims in the period since June 2012 when the LTPPAs went into effect, the monthly DAH-LMPs have been lower than the prices in the IPA's 2010 FEC, and it is anticipated that this will continue to be the case in the near-term future. According to the RS, over the remaining 18-year term of the LTPPAs, it is possible that factors impacting the market prices of electricity will result in DAH-LMPs exceeding the applicable price in the 2010 FEC for periods of time, in which case its primary proposal will result in reduced charges to customers for the energy associated with any curtailed RECs. The RS contends the energy price hedge component of the LTPPAs provides the utilities' eligible retail customers with long-term price certainty associated with a fixed energy hedge that is not adjusted due to current and future market conditions such as natural gas price spikes and incremental environmental costs. The RS says customers are paying for and receiving this price hedge benefit when they pay for the energy component of the LTPPAs. (RS Initial Brief at 11-12)

The RS disputes Staff statement that under the primary proposal, customer rates would exceed the statutory rate cap. The RS claims under the Appendix K procedures, neither the amount of energy purchased under the LTPPA nor its price has anything to do with whether the rates to utility customers exceed the statutorily-defined price cap. The RS says whether the rates to utility customers exceed the statutorily-defined price cap is determined solely based on the imputed REC prices under the LTPPAs and the amount of RECs purchased. Beyond making the assertion that "ratepayers would still be buying renewable energy resources at a price that exceeds the market prices, to an extent that will cause their rates to exceed the statutorily-defined price cap," the RS insists Staff has failed to show how purchasing the energy associated with curtailed RECs would cause the statutory RPS rate caps to be exceeded. The RS maintains the rationale for the primary proposal is that curtailment of REC purchases is sufficient to keep charges to customers within the RPS rate caps; curtailment of the energy associated with the curtailed RECs is not necessary to prevent the rate caps from being exceeded. (RS Reply Brief at 4)

The RS says somewhat similarly to Staff's argument, the IPA points out that through February 2014, based on the energy prices in the 2010 FEC, utility customers have paid more for energy under the LTPPAs than they would have if the same amount of supply had been purchased at current average hourly energy prices. The RS claims, however, all that Staff's and the IPA's argument really shows is that to date, the forecasted energy prices in the IPA's 2010 FEC have been inaccurate. The RS suggests it may be an appropriate subject of inquiry as to why the IPA's 2010 FEC has, to date, proven in general to be higher than actual DAH-LMPs. The RS believes that is an inquiry that should be unrelated to the issue in this docket. According to the RS, the "solution" to the deviation between the IPA's 2010 FEC (which was not disclosed to the LTPPA bidders at the time of the procurement event) and actual wholesale energy prices is not to deprive the LTPPA suppliers of energy revenues under the contracts in the name of compliance with the RPS rate caps. The RS maintains that under the Appendix K procedure that the IPA developed and the Commission approved, compliance with the RPS rate caps is achieved solely and completely through curtailment of REC purchases in the necessary amount. (RS Reply Brief at 5)

The RS says Staff and the IPA acknowledge that the LTPPAs provide an energy price hedge for utility customers, but they contend that it has not been a good hedge, because in most months since the LTPPAs went into effect, the energy hedge price has exceeded the current wholesale price of energy. In the RS' view, their position manifests a fundamental misunderstanding of the purpose of an energy hedge. The RS asserts the purpose of a hedge is not to ensure that the contract price is always at or below the current market price. The RS contends an energy hedge is a cap on the price that the buyer must pay for energy under the contract. Under an energy price hedge provision, the RS says the buyer accepts that the energy hedge price in the contract will sometimes exceed the current market price, in return for a cap on the price that will be paid for energy under the contract, should actual market prices rise. The RS notes in the severely cold months of January and February 2014, when wholesale electricity prices spiked, the energy price hedge component of the LTPPAs capped the price charged to the utilities and their customers at the energy price in the 2010 FEC, preventing the customers from bearing the brunt of the high wholesale market prices in those months. (RS Reply Brief at 6-7)

AIC raises a separate point about potential harm to customers under the RS' primary proposal: "Assuming the costs of the LTPPAs remain higher than the current market, the higher costs incurred by eligible retail customers under the primary proposal could then lead to further switching and greater concentration of costs on an . . . ever smaller pool of eligible retail customers." The RS notes AIC acknowledges that "such a scenario to be relatively remote," and provides no quantification of the likelihood of this occurring. The RS maintains for the current plan year, the energy associated with the curtailed RECs under the ComEd LTPPAs is equal to only about 2.1% of the ComEd eligible retail customer load. In the RS' view, the energy supplied under LTPPAs is not a sufficiently large component of the total energy required to serve eligible retail customers to have the degree of price impact suggested by AIC. The RS also asserts since its primary proposal provides for reduced charges to utility customers to the extent necessary to prevent the RPS rate caps from being exceeded, it seems unlikely that the rate impact postulated by AIC would cause an upward spiral to utility customers in the manner AIC suggests. (RS Reply Brief at 7)

ComEd asserts that "[t]he record is clear that ComEd and AIC customers have already paid a premium to the Suppliers to accept or manage this risk" of load-shifting "in the agreed-to fixed price contained in the LTPPAs," and cites Mr. Zahakaylo's testimony (ComEd Ex. 1.0) at lines 288-307 for this assertion. According to the RS, the cited testimony does not support ComEd's assertion and does not even address the topic, other than repeating that the LTPPA suppliers should have known of the risk of curtailments when they bid on the contracts. The RS says it is correct, however, that the utilities, and therefore their customers, purchased and are paying for an energy price hedge in the LTPPAs. The RS maintains the upside price protection of the energy price hedge has already benefited customers in certain months and may continue to do so in the future if market prices exceed the energy hedge price. The RS states curtailing the energy purchases associated with curtailed RECs, as occurs under the current curtailment method, inappropriately relieves customers from paying for the energy hedge on that portion of the contract. (RS Reply Brief at 7-8)

The RS also argues that adoption of the primary proposal will help to restore confidence in the renewable generation development and investment communities in entering into long-term contracts to serve the demand for renewable energy in Illinois. The RS asserts long-term contacts are the lowest cost and most efficient means of financing the construction of new renewable generation resources. The RS believes adoption of the primary proposal should result in lower long-term RPS compliance costs in Illinois, thereby benefitting customers. (RS Initial Brief at 12)

According to the RS, adoption of the primary proposal is in the public interest because it will restore the confidence of renewable energy developers and investors in entering into long-term supply contracts to serve the Illinois market and in developing new wind generation facilities in Illinois and to serve the Illinois market. The RS says the curtailments of purchases under the LTPPAs and the method of implementing the curtailments, in which the LTPPA suppliers are deprived of more revenues than is necessary to comply with the RPS rate caps, has reduced the revenues that the LTPPA suppliers reasonably expected to receive under their contracts, and has created uncertainty as to the revenues they can expect from the LTPPAs. Although the purchases of curtailed RECs (at the imputed REC prices) by ComEd and the IPA has reduced the revenue losses, the RS says LTPPA suppliers are still experiencing revenue shortfalls due to the curtailment of purchases of the energy associated with the curtailed RECs. The RS states that adoption of the primary proposal will eliminate this revenue shortfall. (RS Initial Brief at 12-13)

The RS asserts that prospective developers and suppliers of renewable resources need to have reasonable expectations of revenue certainty in the long-term contracts they enter into, or they will not enter into contracts or develop projects to serve Illinois (or will do so only at much higher prices). The RS claims the current method of implementing curtailments, which deprives the LTPPA suppliers of more revenue than necessary to comply with the RPS rate caps, creates uncertainty in this regard. If the expectations of renewable energy developers and suppliers, and their lenders and investors, concerning the revenues to be received under long-term contracts are not realized, then the RS asserts in the future, prospective renewable generation developers may be unwilling to invest capital and develop new projects within Illinois or to serve Illinois, and may be unable to obtain financing for such projects. The RS says this outcome would deprive the State of the environmental and economic development benefits of new wind projects, and could result in higher financing costs for projects, reduced supplies of renewable energy and RECs, and higher RPS compliance costs, all to the detriment of retail electricity customers in Illinois. In the RS' view, these outcomes would not be in the public interest. (RS Initial Brief at 13)

The RS contends that because wind generation facilities have no fuel costs and low overall operating costs, their primary cost is the initial capital investment, which typically must be amortized and recovered over a 20-year period. As a result, the RS says for investors to decide to invest in wind farms, they must be confident that there are long-term revenue streams sufficient to provide for recovery of the capital costs and a reasonable rate of return on capital. The RS claims wind generation projects receive revenues from the federal production tax credit (when available) and (to a lesser extent) from payments for capacity; however, they must also receive sufficient revenues from the sale of RECs and energy to have sufficient overall revenues to finance, recover and earn a return on the capital investment. According to the RS, fixed-price long-term supply contracts are the most efficient and lowest-cost means to ensure adequate capital recovery and revenue adequacy for wind farm investments. The RS says other forms of development, such as purely merchant projects (i.e., projects, without a long-term customer(s), that are dependent on spot market sales) and hybrid merchant/contract projects, will have higher costs of capital and therefor higher overall costs. (RS Initial Brief at 13-14)

The RS estimates that, taking into account both load served by utilities and load served by ARES, approximately 8,000 megawatts ("MW") of wind generation facilities will be needed to meet the Illinois statutory RPS requirement of 25% renewable energy supply in 2025 (as compared to approximately 3,600 MW currently in service). The RS says this will require substantial capital investment in new wind generation facilities. The RS opines that it is unlikely that the renewable generation needed to achieve Illinois' RPS requirements will be achieved without the availability of long-term supply contracts. The RS contends potential investors in wind energy projects will only initiate these investments if they believe they can recover their capital costs and earn a reasonable, risk-adjusted return. The RS says the riskier the prospects for capital recovery of a wind generation project, the higher will be its costs of debt and equity, and thus the higher its costs to customers. The RS asserts actions and policies which undermine confidence in long-term power purchase agreements will necessarily dampen investors' interest in new renewable energy projects to meet Illinois' RPS requirements and the overall demand for clean electricity in Illinois. In the RS' view, factors which discourage entry into long-term supply contracts, such as the current method of implementing curtailments to meet the RPS price caps, must be addressed. The RS claims if the LTPPA suppliers do not receive the revenues anticipated under these existing contracts, this will signal to investors that they must either earn higher returns to account for the potential regulatory risks of doing business in Illinois – which will raise RPS compliance costs and increase the likelihood that the RPS rate caps will be triggered in the future – or they will seek to deploy their capital in other jurisdictions with less risk. (RS Initial Brief at 14-15)

The RS claims the negative impacts of the current method of implementing the LTPPA curtailments are being manifested in Illinois. The RS says two of its witnesses testified that their companies have stopped project development activities in Illinois due to uncertainties arising from the curtailments and the significant revenue losses on their LTPPAs. (RS Initial Brief at 15)

Staff asserts that in Mr. Thumma's discussion of the importance of predictable long-term contract revenues to provide the lowest cost, most efficient financing of new renewable generation facilities, he omits additional revenue streams, specifically revenues from capacity services provided to PJM or MISO and from accelerated depreciation. The RS responds that Mr. Thumma did not "omit" discussion of these two items. The RS says he pointed out that (1) although wind farms receive capacity revenues from participating in capacity markets, wind farms are primarily energy, not capacity resources, and capacity revenues generally comprise only a small portion of a wind farm's revenue stream; and (2) while accelerated depreciation is a meaningful tax incentive that is considered in the financial analysis of a new project, it is not a source of revenue. The RS notes Staff agrees with the latter point. The RS asserts the availability of capacity revenues and accelerated depreciation does not offset the need for predictable long-term revenues from energy and RECs to be able to finance new projects. (RS Reply Brief at 23-24)

The RS asserts that as a result of the recent regulatory actions in Illinois related to the curtailments, one development team is not looking at potential sites in Illinois for new wind generation projects; instead, its is pursuing new renewable energy development in other states, including Michigan, Kansas and Oklahoma. The RS claims the key factor in that decision not to develop any further projects in Illinois at this time is the revenue losses due to curtailments under its LTPPA with ComEd. According to the RS, the fact that RS suppliers are experiencing revenue losses greater than required to satisfy the RPS rate caps calls into question why they should develop any future projects or enter into any future contracts in Illinois. (RS Initial Brief at 15-16)

The RS states one supplier has more than 500 MW of new projects in Illinois that are near construction-ready, with transmission agreements signed, years of meteorological data compiled to measure wind speeds, and local permits secured. However, with the increasing concerns relating to the current Illinois RPS procurement situation that does not offer prospects for additional long-term contracting in the foreseeable future, and that suppliers' existing Illinois LTPPAs being curtailed, thereby subjecting it to fluctuating and uncertain revenues on the contracts, Illinois has become a much less attractive market. The RS says for that supplier, the most crucial factor in determining where to deploy development capital is the ability to obtain certainty of long-term revenue streams over the life of a project. The RS asserts that supplier has not proceeded to construction on any of the 500 MW of new projects and currently has no projects under construction in Illinois. The RS says the supplier has terminated interconnection queue positions and interconnection agreements for proposed Illinois projects and has redeployed its capital and its development employees away from Illinois into other markets where it can get long-term contracts that have stable expected revenue streams. (RS Initial Brief at 16)

According to the RS, the American Wind Energy Association reports that zero MWs of new wind farms were placed into operation in Illinois in 2013. The RS states while there are over 12,000 MWs of new wind power facilities under construction across the U.S., zero MWs of these projects are in Illinois. The RS claims no projects have been constructed or moved into operation in Illinois since the LTPPA curtailments started occurring. (RS Initial Brief at 16)

The RS insists the current method of curtailing the LTPPAs produces a disincentive to build new renewable generation plants to meet the Illinois RPS requirements, because it prevents the LTPPA suppliers from earning sufficient revenues to recover costs. As a result, the RS believes facilities that could have been built to meet the Illinois RPS requirements will likely be built to meet the needs of states that provide better opportunities to receive sufficient revenues to recover costs. (RS Initial Brief at 17)

According to the RS, the uncertainty created by the current LTPPA curtailment methodology, which deprives the LTPPA suppliers of more revenue than is necessary to comply with the RPS rate caps, creates a disincentive to renewable energy suppliers to invest in resources to meet the Illinois RPS. The RS says the disincentives to development of new renewable generation projects in Illinois that the current curtailment methodology creates are not in the public interest. In the RS' view, elimination of these disincentives through adoption of the primary proposal, which will eliminate the energy revenue shortfalls that LTPPA suppliers are experiencing under the present method of implementing curtailments, is in the public interest. The RS says creating and maintaining conditions that foster development of new renewable generation projects in Illinois or to serve the Illinois market is in the public interest, for numerous reasons. (RS Initial Brief at 18)

The RS states the General Assembly, as the public policy of the state of Illinois, has established an objective of meeting 25% of the State’s electricity requirements from renewable resources by 2025. The RS says construction of significant additional renewable generation – whether in Illinois, or in nearby states to serve Illinois – will be needed to meet this statutory objective. The RS submits that the General Assembly established the RPS not simply to require utilities and ARES to purchase RECs from out-of-State sources, but to provide an incentive for the development of physical renewable generation assets in Illinois. (RS Initial Brief at 18)

The RS also asserts that renewable generation has a beneficial impact on the environment. The RS says renewable generation is a clean source of energy that protects the environment. The RS also claims renewable resources typically do not have the air quality, water quality or toxicity issues that fossil fuel resources have; renewable resources thereby provide environmental benefits to the states in which they are located. In the RS' view, it is not in the public interest to discourage renewable generation projects in or near to Illinois. (RS Initial Brief at 18, Reply Brief at 21)

The RS claims wind and solar generation projects, which have zero fuel costs and low marginal operating costs, contribute to lower overall wholesale power prices, which benefits consumers. Due to their zero fuel costs, the RS asserts wind and solar generation projects provide a long-term fixed energy price which in turn provides a hedge for consumers against price uncertainty and volatility from both short-term events (e.g., power plant outages, weather conditions or fuel price spikes) and long-term changes (e.g., long-term increases in fuel commodity prices, incremental environmental costs, and other factors). (RS Initial Brief at 18-19)

The RS contends the use of long-term supply contracts to support construction of renewable generation to meet Illinois’ RPS requirements will produce lower RPS compliance costs (and lower costs for clean energy generally), thereby benefitting electricity consumers. The RS maintains long-term supply contracts provide the most efficient and lowest cost means to finance new renewables projects, which will produce lower costs of capital for these projects and ultimately lower costs to consumers. The

RS also claims lower costs for renewable resources will reduce the risk that the RPS rate caps will be triggered, which would prevent the full RPS requirements from being met. (RS Initial Brief at 19)

According to the RS, construction and operation of renewable generation projects in Illinois can produce significant economic development benefits for the State and for the localities in which the plants are constructed. The RS claims renewable energy project development is a labor-intensive undertaking and relies on many components that are manufactured in the U.S. The RS says jobs are created in manufacturing, construction, operations and maintenance. The RS states renewable generation projects are primarily developed in rural areas and can stimulate economic activity needed in these areas. The RS claims development of renewable generation facilities can have strong positive effects on rural communities as a result of employment, incremental property tax and other tax revenues, and industrial and municipal revitalization. If development of renewable generation in Illinois is discouraged as a result of the current curtailment methodology, the RS avers Illinois will not realize the benefits of this economic development activity, and these benefits may instead be captured by other states. (RS Initial Brief at 19, Reply Brief at 21-22)

The RS notes Staff and the IPA contend that there are other factors, in addition to the LTPPA curtailments and methodology, that could cause a renewable generation developer to decide not to locate new projects in Illinois. They cite low wholesale energy prices in Illinois, low capacity prices from the regional transmission organizations, a current “oversupply” of RECs to the Illinois market, that the RRB is currently at or near its cap limit, and that making purchases using the funds in the IPA RERF requires a parallel utility procurement. The RS acknowledges these other potential factors, but insist that the key factor for recent decisions not to develop any further projects in Illinois at this time is the significant curtailments and associated revenue losses experienced under the current LTPPAs with ComEd. The RS says at least one company has stopped wind development activity for any new projects in Illinois, but at the same time continued to develop projects in other states in the Midwest over the past two years. (RS Reply Brief at 22-23)

The RS maintains adoption of its primary proposal will eliminate the revenue shortfall that the LTPPA suppliers are presently experiencing due to the current methodology of implementing curtailments, and will remove the disincentives to developing new renewable generation projects in Illinois and in nearby states to serve the Illinois market. The RS says settlement of the energy associated with curtailed RECs on the basis of the difference between the energy price in the 2010 FEC and the current DAH-LMPs, coupled with the continued purchase of curtailed RECs at the “Appendix K” imputed REC price by the utility using accumulated hourly ACP funds and (to the extent necessary) by the IPA using the RERF, will provide the LTPPA suppliers with the full revenue stream contracted for in the LTPPAs. In the RS' view, this should restore confidence that long-term supply contracts to serve the Illinois RPS market will be a reliable source of revenue to recover the costs of new renewable generation projects. (RS Initial Brief at 19-20)

According to the RS, Staff erroneously characterizes the RS as arguing that in order to ensure that Illinois' RPS goals are met in the future, the Commission must assure renewables developers that it is "profitable" to enter into long-term contracts with Illinois utilities, must ensure that the LTPPAs are "profitable at any cost," and must "ensure the profitability of suppliers." The RS believes Staff's characterizations are hyperbole. The RS asserts it is simply pointing out that prospective renewable energy suppliers need to have reasonable expectations of revenue certainty in the long-term contracts they enter into, or they will not enter into contracts or develop projects to serve Illinois (or will do so only at much higher prices); and that the current method of curtailments, which deprives the LTPPA suppliers of more revenue than is necessary to comply with the RPS rate caps, creates the type of uncertainties that need to be avoided. The RS contends it is not arguing that the Commission needs to "ensure profitability" for renewables suppliers, but rather that suppliers need reasonable certainty and predictability that they will receive the revenues they contract to receive in return for supplying renewable resources to meet Illinois' RPS requirements. The RS says it is up to the individual renewable generation developer or supplier to construct and operate its projects at costs that will make them profitable based on the contracted revenues. If a developer or supplier cannot construct and operate its projects at costs levels that, based on the revenue levels contracted for, enable it to recover the investment and earn a return, the RS says neither the Commission nor the State is obligated to maintain the developer's profitability. (RS Reply Brief at 24-25)

The RS maintains that continued development of renewable generation projects in Illinois will provide significant economic and employment benefits for the State, and says Staff quibbles that an academic article cited by Mr. Reed indicates that some other alternative energy technologies, such as landfill gas and energy efficiency projects, may produce higher numbers of job-years per unit of energy output than wind generation projects. The RS insists the study supports its position that continued development of new renewable generation projects in Illinois will provide economic and employment benefits to the State and is in the public interest. The RS says the article states, "An increasing number of studies are finding that greater use of renewable energy (RE) systems and energy efficiency provides economic benefits through job creation, while at the same time protecting the economy from political and economic risks associated with over-reliance on a limited suite of energy technologies and fuels;" and "[a]ggressive EE [energy efficiency] measures combined with a 30% RPS target in 2030 can generate over 4 million full-time-equivalent job-years by 2030." (RS Reply Brief at 25-26)

The IPA argues that not curtailing the energy component of the LTPPAs would not increase the environmental benefits of the LTPPA suppliers' facilities, because the environmental benefits are captured by the RECs. The RS claims the IPA misapprehends the environmental benefits of the RS' proposal. The RS asserts that adopting the primary or secondary proposal will increase certainty that revenues contracted for under the LTPPAs will be received by the suppliers and will eliminate the current disincentive to development of new renewable generation facilities in Illinois, and in nearby states to serve Illinois. The RS believes is will lead to environmental benefits as new renewables facilities are developed and placed into service. (RS Reply Brief at 26)

The IPA contends that the RS' primary proposal is inconsistent with the legislatively-mandated requirements of the IPA procurement process, which the IPA states could harm eligible retail customers by adding uncertainty to future procurements. The RS complains the IPA does not explain how the primary proposal is inconsistent with the legislatively-mandated requirements of the IPA procurement process. The RS asserts adoption of the primary proposal will not add uncertainty to future procurements. The RS says it will reduce uncertainty in future procurements. The RS argues prospective suppliers will be able to approach future procurements with confidence that if they are awarded a contract, there will be certainty as to the receipt of the contracted revenues. The RS says prospective suppliers will not see a need to bid higher prices, including additional “risk premiums” (which may result in bids exceeding the competitive pricing benchmarks), or decide not to participate because the process is too risky and unpredictable. The RS believes the outcomes produced by adoption of the primary proposal will benefit, not harm, eligible retail customers. (RS Reply Brief at 26)

AIC suggests that the primary proposal may be inconsistent with the statutory requirements for benchmarking on prices paid for energy and the use of sealed bids for selection of contracts based on price. The RS indicates it does not see a basis for this concern. The RS says the LTPPAs were bid and awarded on the basis of a single Contract Price submitted by each bidder, and the primary proposal does not require the Contract Price of any LTPPA to be exceeded. The RS states the primary proposal is directly tied to the values used by the IPA to benchmark the original bids, namely, the energy prices in the IPA’s 2010 FEC and the imputed REC price. The RS says the primary proposal provides for the energy associated with curtailed RECs to be purchased at the applicable year’s price from the 2010 FEC that was used by the IPA for benchmarking purposes. According to the RS, the price paid for the energy associated with the curtailed RECs will be the same price paid under the LTPPAs for the energy associated with non-curtailed RECs. (RS Reply Brief at 27)

Under the RS' primary proposal, in the event of a curtailment of REC purchases under a utility’s LTPPAs to meet the RPS rate caps, the utility would curtail its purchases of RECs in the percentage necessary to meet the rate caps, but would continue to settle with each LTPPA supplier on a monthly basis for the energy associated with the curtailed RECs, at a price equal to the 2010 FEC price less the DAH-LMPs during the month. The RS says curtailing only the REC component of the LTPPA is a simple calculation that can be performed during the monthly settlements process. According to the RS, the entire contract quantity of the LTPPA (RECs plus energy) would be settled as usual, but an offset for the curtailed RECs would be calculated by multiplying the following three quantities: (1) the total monthly production of the facility (not exceeding the maximum contract quantity), (2) the curtailment percentage, and (3) the imputed REC price calculated in accordance with Appendix K (Contract Price less 2010 FEC price). This offset amount would be deducted from the normal monthly settlement amount under the LTPPAs. The RS says Mr. Gordon described this settlement mechanism for the primary proposal in his direct testimony on rehearing, and no other witness proposed an alternative mechanism. (RS Initial Brief at 20-21)

The RS argues that its secondary proposal would not harm the utility's customers. Under the secondary proposal, the RS claims eligible retail customers continue to receive the full protection of the statutory RPS rate caps. The RS says the secondary proposal does not involve any charges to the utility's eligible retail customers. The RS notes AIC witness Mr. McCartney pointed out, the secondary proposal would not result in higher costs to eligible retail customers and, in fact, it would not incrementally result in higher costs for any customers. (RS Initial Brief at 21)

Under the secondary proposal, if a curtailment were needed, the utility would curtail purchases of both RECs and the associated energy under the LTPPAs in the specified percentage; i.e., the current curtailment methodology would continue to be used. The RS says the utility would then use its accumulated balance of hourly ACP funds to purchase curtailed RECs from the LTPPA suppliers at a price equal to the Contract Price less the DAH-LMPs. The RS says hourly ACP funds are collected from the utility's customers served on its hourly pricing tariffs; these customers are not "eligible retail customers." The RS also asserts when the utility uses its accumulated hourly ACP funds to purchase curtailed RECs, it does not charge the hourly pricing customers for the cost incurred to purchase the curtailed RECs, nor to "restore" the balance of hourly ACP funds. (RS Initial Brief at 21)

The RS states because it is anticipated that, depending on the extent of the curtailment and other variables, the utility's accumulated hourly ACP funds may be insufficient to purchase all curtailed RECs under the secondary proposal, it is expected that the IPA will continue to purchase any remaining curtailed RECs, using the RERF. The RS says the purchase of curtailed RECs by the IPA using the RERF also does not involve any charges to the utility's eligible retail customers. The RS also says the source of funds in the RERF is ACPs paid by ARES to the IPA in respect of the ARES' kWh sales to their customers. The RS notes that an ARES customer is not an eligible retail customer of an electric utility. The RS also asserts the amount of ACPs that an ARES is required to make or voluntarily makes into the RERF, pursuant to Section 16-115D(d) of the PUA, is completely independent of how the IPA spends the monies in the RERF. (RS Initial Brief at 21-22)

The RS insists its secondary proposal is in the public interest for similar reasons as the primary proposal: the secondary proposal will help to restore revenue certainty to the LTPPAs and thereby restore confidence in long-term supply contracting for renewable generation projects in Illinois and to serve the Illinois renewables market, thereby supporting development of future projects. The RS says under the current curtailment methodology, the LTPPA suppliers are losing revenues equal to the difference between the 2010 FEC price and the current DAH-LMPs. The RS claims its secondary proposal addresses this shortfall by providing for the utility (and the IPA if it voluntarily chooses to do so) to purchase curtailed RECs at an imputed REC price equal to the LTPPA Contract Price less the DAH-LMPs, thereby eliminating the revenue shortfall created by the difference between the projected price in the 2010 FEC and the current wholesale market energy price. The RS asserts this REC price calculation is also equivalent to the financial settlement mechanism in the LTPPAs. The RS insists its secondary proposal maintains the statutory RPS price caps for eligible retail customers. (RS Initial Brief at 22-23)

The RS indicates it presented the alternative proposal as a second-best choice to the primary proposal for two reasons. According to the RS, the primary proposal is structurally preferable because it flows directly and logically from, and is consistent with, the method the IPA uses, and the Commission has approved, for determining the imputed price of RECs and for determining if the RRB will be exceeded and whether and to what extent a curtailment of REC purchases under the LTPPA is necessary. The RS claims the secondary proposal does not provide the same degree of predictable revenue certainty for LTPPA suppliers in the event of curtailments as does the primary proposal, because the utility's ability to buy the full amount of curtailed RECs at the imputed REC price defined by the secondary proposal is limited by the utility's accumulated balance of hourly ACP funds. The RS says depending on (i) the extent of the curtailment, (ii) the difference between the energy price in the 2010 FEC and the current DAH-LMPs, and (ii) the accumulated balance of the utility's hourly ACP funds, the utility's hourly ACP funds may or may not be sufficient to purchase all the curtailed RECs in a year under the secondary proposal. The RS claims because it would be questionable from year to year whether the utility would have sufficient accumulated hourly ACP funds to purchase all the curtailed RECs at the imputed REC price provided for in the secondary proposal, the secondary proposal would not provide the same predictable revenue certainty under the LTPPAs as would the primary proposal. (RS Initial Brief at 23)

The RS proposes for purchases of curtailed RECs under the secondary proposal would be implemented as follows: Assuming a curtailment were declared for a year, the utility's accumulated balance of hourly ACP funds at the start of the year (June 1) would be used to purchase curtailed RECs during the year. At the start of the year, the RS says the utility's accumulated balance of hourly ACP funds would be allocated *pro rata* to the LTPPA suppliers based on the Annual Contract Quantity ("ACQ") of each supplier's LTPPA(s) to the aggregate ACQ of all the utility's LTPPAs. Going forward into the year, the RS says each supplier's allocated portion of the balance of hourly ACP funds would be used to purchase the full amount of that supplier's curtailed RECs in each month, unless and until that supplier's portion of the hourly ACP funds is exhausted. The RS suggests if a supplier's allocated portion of the hourly ACP funds is exhausted before the end of the year (May 31) by the utility's purchase of curtailed RECs from that supplier, the supplier can sell any remaining curtailed RECs for the remainder of the year to the IPA (assuming the IPA elects to purchase them, which presumably would be at a price equal to the "Appendix K" imputed REC price of Contract Price less 2010 FEC price). (RS Initial Brief at 24)

On a monthly basis, the RS says the utility would simply settle with the supplier each month for the curtailed RECs purchased with hourly ACP funds on the basis of the same price data used to settle the non-curtailed part of the LTPPAs, i.e., the LTPPA Contract Price less the DAH-LMPs in that month. (RS Initial Brief at 25)

The RS notes that AIC witness McCartney objected to adoption of the primary proposal but stated no position on the secondary proposal. The RS also notes that ComEd witness Zahakaylo objected to the primary proposal but stated no position on the secondary proposal. The RS says Staff witness Zuraski objected to adoption of either proposal but stated that if either proposal were adopted, it should be funded solely from the utilities' accumulated hourly ACP funds. The RS indicates IPA witness Star stated that the IPA does not support the primary proposal but does support the secondary proposal so long as it is limited to the purchase of curtailed RECs by the utilities using hourly ACP funds. (RS Initial Brief at 24-25)

According to the RS, the witnesses for ComEd, Staff and the IPA each presented some form of the following arguments: the conditions which would lead to customer shifting from utilities to ARES were in place at the time of the December 2010 long-term renewable resources procurement event; the LTPPA suppliers knew or should have known that there was a risk of curtailments of the LTPPAs due to load shifting, and the LTPPA suppliers should have submitted higher bids to compensate for these risks or taken other actions to protect themselves against these risks. (RS Initial Brief at 25)

The RS states the principal reason for the need to impose curtailments on the LTPPAs in order to stay within the RPS rate caps has been the large numbers of eligible retail customers switching from the utilities to ARES as the result of municipal aggregation programs. The RS says although the amendment to the IPA Act authorizing municipal aggregation programs was enacted in 2009, no successful municipal aggregation referenda were held in 2010 and only about 20 successful referenda were held in 2011. The RS claims it was the substantial number of "opt-out" municipal aggregation referenda held in 2012 and 2013 and the implementation of aggregation programs pursuant to those referenda, along with a significant price difference between the energy price in ComEd's bundled service offering and the current market energy prices that ARES were able to offer to customers under municipal aggregation programs, that resulted in substantial customer switching from the utilities to ARES in 2012 and 2013. (RS Initial Brief at 25-26)

The RS acknowledges that the statute authorizing municipal aggregation was enacted in 2009 and that at the time of the December 2010 procurement event, bidders were aware that the contract terms for the LTPPAs provided for curtailments if needed to stay within the RPS rate caps, which could occur if the utilities lost sufficient customer load. The RS claims that at the time of the December 2010 procurement event, the LTPPA bidders reasonably anticipated that there was not a serious risk of curtailments due to load-shifting and the RPS rate caps being exceeded. The RS avers this is because, in order to ensure that the renewables costs of the LTPPAs would never exceed the RPS rate caps, the IPA adjusted downward the total annual megawatt-hour

("MWh") amount of renewables to be procured, and then awarded LTPPAs for an even smaller amount of renewables than planned. The RS says the quantity contracted under the LTPPAs was only 3.2% of ComEd's forecasted energy requirements to serve its eligible retail customers. The RS says the IPA capped the quantity of renewables to be purchased at a small fraction of each utility's anticipated eligible retail customer load. Additionally, the RS states the IPA projected what the 2012-2013 RRB would be, and imposed a budget cap for the 2010 LTPPA procurement at 30% of the estimated RRB. The RS indicates the IPA specified that the cost of renewables purchased through the LTPPA procurement event could not exceed 30% of the projected RRB for the 2012-2013 plan year. (RS Initial Brief at 26-27)

According to the RS, both of the measures the IPA implemented were intended to demonstrate prudence and conservatism with respect to the energy supply portfolio that the IPA was overseeing, and it does not appear that the amount of renewable resources being contracted through the LTPPAs was considered excessive at the time of the December 2010 procurement event. The RS also says in structuring the December 2010 LTPPA procurement within these limits, the IPA had the advice and support of experienced and knowledgeable consultants as its Procurement Administrators. (RS Initial Brief at 27)

The RS contends the LTPPA bidders reasonably relied on the precautions that the IPA took to significantly limit both the quantity and dollar amount of renewable resources procured in the December 2010 LTPPA procurement event, as eliminating the risk of curtailments of purchases under the LTPPAs due to load shifting away from the utilities. The RS says the other parties' witnesses who contended that the RS should have been aware of the prospects of load shifting and, as a result, LTPPA curtailments, are contending that the bidders should have had greater foresight than the IPA. (RS Initial Brief at 27, Reply Brief at 9)

The RS also asserts that a number of states, including California, Massachusetts, and New Jersey, have enacted laws that enable municipal aggregation, but those states have not experienced aggregation that remotely resembled what has occurred in Illinois. The RS contends that Illinois has been the fastest growing municipal aggregation state in the nation. (RS Reply Brief at 9-10)

Although several witnesses asserted that the LTPPA bidders should have taken actions to address the risk of load shifting from the utilities and possible curtailments under the LTPPAs, the RS claims none of these witnesses suggested what actions the bidders should have taken, other than that they should have bid higher prices in light of the curtailment risk. In the RS' view, the assertion that bidders should have bid higher prices ignores the fact that selection of the winning bidders was not based solely on who bid the lowest prices. The RS says as specified in Section 1-75(c)(1) of the IPA Act and Section 16-111.5(e)(3) of the PUA, any bid to supply renewable resources in a utility procurement administered by the IPA (even the low bid) must also pass the "cost-effective" test of being equal to or less than confidential "benchmark" market prices for renewable resources in the region established by the IPA and its Procurement

Administrator in consultation with the Procurement Monitor and Commission Staff, and approved by the Commission, or the bid will be rejected. The RS argues any bidder's desire to submit a higher bid price in light of perceived risks of the transaction was constrained by the need to assess what the regional benchmark market prices for renewable resources were likely to be, and keep the bid at or below the anticipated benchmark price. (RS Initial Brief at 27-28, Reply Brief at 10-11)

The RS also claims any bidder's ability to submit a higher bid price in light of perceived risks was also constrained by the competitive nature of the bidding and procurement process. In formulating their bids, the RS says bidders had to take into account competitive market conditions and the likely bidding strategies of the other bidders. According to the RS, it was precisely to subject the procurement of electricity to serve eligible retail customers to competitive market pressures that the procurement process established by Section 1-75(c) of the IPA Act and Section 16-111.5 of the PUA was enacted. (RS Initial Brief at 28)

The RS asserts that by bidding to supply a specified amount of RECs and energy under a LTPPA, each bidder was committing to supply, if its bid were accepted, that amount of RECs and energy over a 20-year period, subject only to a potential risk of an unknown amount of curtailment of REC purchases in unspecified years, with the potential curtailment percentages varying from year-to-year (and possibly being a positive number in some years and zero in other years.) The RS claims the need to hedge against possible curtailments could only have been known if the level of customer switching that would occur was knowable, which it was not. (RS Initial Brief at 28-29)

The RS says the imputed REC prices that would be assigned to each LTPPA, and the annual determination of whether the RRB would be exceeded and a curtailment of REC purchases would be needed, were both critically dependent on the forecasted energy prices over the 20-year contract term in the IPA's confidential 2010 FEC. The RS claims the confidential 2010 FEC was not disclosed to the bidders. The RS also says the specific revenue loss that the RS are seeking to mitigate through its proposals results from the difference between the energy prices in the IPA's 2010 FEC and the actual wholesale market energy prices that have been experienced in 2013-2014 and are expected to continue for at least the near term. Without access to the 2010 FEC at the time bids were submitted, the RS argues the bidders could not know how much to hedge to mitigate their risks. (RS Initial Brief at 29)

The RS believes the type of risk management actions that the other parties' witnesses assert the LTPPA bidders should have taken would not have been possible based on the information available in December 2010 and the structure of the contracts to be bid on. The RS claims other parties' witnesses identified no hedging or other risk-management strategy that could have protected the bidders from the risks described above. In the RS' view, the assertions that the RS should have taken appropriate steps to protect themselves are hindsight. The RS argues the only strategies to avoid the risks that have manifested would have been to (1) refrain from bidding at all (thereby reducing the number of competitive bidders), or (2) bid significantly higher prices, either of which would have been detrimental to the competitive procurement process and ultimately to the interests of utility customers (and, in the case of the latter strategy, could have resulted in no bids satisfying the test of “benchmark” competitive regional market prices required by Section 1-75(c)(1) of the IPA Act). (RS Initial Brief at 29-30)

According to the RS, the question of whether the LTPPA bidders should have known of the risks of load-shifting and curtailment at the time of the December 2010 procurement event and what they should have done about those risks is a diversion from the problem the RS is seeking to address prospectively through its proposals. The RS says it was aware that the implementation of the contracts would be subject to the RPS rate caps and that the contract terms (which were not subject to negotiation) included a “regulatory out” provision under which the utility would not be required to pay the LTPPA suppliers for costs that the Commission ruled could not be recovered through charges to the utility’s customers. The RS maintains that (1) the revenue loss that the RS are specifically seeking to mitigate with its proposals is the revenue loss due to the curtailment of the energy associated with curtailed RECs; (2) the curtailment of the energy associated with curtailed RECs and the loss of the related energy revenues is not necessary to comply with the RPS rate caps, and (3) the cost to the utilities of settling the energy associated with curtailed RECs, if the RS’ primary proposal is adopted, is recoverable through the utilities’ tariffs (or, depending on the relationship between the current market price of energy and the price in the 2010 FEC, may result in a reduction of the charges to the utility’s customers). (RS Initial Brief at 30)

The RS contends that whether the RS knew or should have known at the time of bidding that there was a serious risk of curtailment of the LTPPAs due to customer load shifting is beside the point of its primary proposal. The RS says it is not complaining about the fact of curtailments due to customer load migration *per se*, nor does the primary proposal eliminate curtailments. Rather, the RS says the point of the primary proposal is that the curtailment of both RECs and the associated energy under the current curtailment methodology is not necessary in order to prevent the RPS rate caps from being exceeded; therefore, as permitted by the terms of the LTPPAs, the Commission should direct that curtailments be implemented by curtailing only the purchase of RECs. (RS Reply Brief at 11-12)

The RS notes witnesses for ComEd, Staff and the IPA contended that by its primary proposal, the RS is attempting to change or renegotiate the terms of the LTPPAs. The RS maintains it is not proposing to change or renegotiate any terms of the LTPPAs; rather, it is asking the Commission to adopt a different method to implement curtailments, which is allowed for under the terms of the LTPPAs. (RS Initial Brief at 31)

The RS says the relevant provision of the LTPPAs, which is in Section D, Payment Obligations, in the “Confirmation” provision of the LTPPAs, states:

> **Buyer is allowed to recover all costs and other amounts incurred under this Confirmation and the Master Agreement from its customers pursuant to a pass-through tariff** that is authorized by section 16-111.5(l) of the Illinois Public Utilities Act (220 ILCS 5/16-111.5(l)) and approved by the Illinois Commerce Commission. Notwithstanding anything to the contrary in this Confirmation or the Master Agreement, **Buyer shall not be liable to Seller for any amounts**, including any Early Termination Amounts that might otherwise be due under Section 6(e) of the Master Agreement, **that Buyer is not allowed to or cannot recover, for whatever reason, from its customers through those pass-through tariffs.**
>
> **Unless otherwise required by law, statute or an order, rule or decision of the Illinois Commerce Commission**, Buyer will not refuse to pay for any Product delivered by Seller for the sole reason that payment for Product would cause the cost caps provided for in Section 1-75(c)(2) of the Illinois Power Agency Act (20 ILCS 3855/1-75(c)(2)) to be exceeded. **In the event that Buyer is not allowed to recover any costs as a result of any of the above actions**, the following additional conditions shall apply: 1) Buyer shall inform seller as soon as practical of the law, statute or order, rule or decision of the Illinois Commerce Commission limiting costs recovery; 2) **unless otherwise directed by the Illinois Commerce Commission**, Buyer shall reduce the quantity of Product purchased under all contracts for renewable energy resources that allow for *pro-ration* in this circumstance and that are effective and in force at the time by reducing proportionately for each contract the Annual Contract Quantity or similar contract term as required such that the amount of expenditures for Product are recoverable; and 3) Buyer will provide notice to Seller each time a change is made to the Annual Contract Quantity under this provision. [Emphasis added.]

The RS says it recognizes that the above-quoted provision specifies a default method for implementing curtailments, by reducing the quantity of “Product” purchased under the LTPPAs. The RS also says the default method is conditioned by “unless otherwise directed by the Illinois Commerce Commission.” The RS claims it is seeking to have a different method of implementing curtailments “directed by the Commission.” The RS asserts while the above-quoted provision gives the utility the “regulatory out” protection of not having to pay the supplier for any costs that the utility is not allowed to recover through its tariff, this provision conditions the utility’s right not to pay a supplier on an order, rule or decision of the Commission specifying that the utility is not required to pay costs otherwise due the supplier under the LTPPA. The RS believes it is important under the primary proposal, the utility is not required to pay the LTPPA supplier, pursuant to the contract, for any costs that the utility is not allowed to recover through its tariff. The RS maintains the primary proposal preserves the fundamental objective of the contract provision, specifically, the “regulatory out” protection for the utility. (RS Initial Brief at 31-32)

The RS maintains its primary proposal provides for a different method of implementing curtailments than heretofore used, but which still (1) preserves the existing method of determining REC prices under the LTPPAs and of determining whether the RRB is exceeded and a curtailment is needed; (2) prevents the RPS rate caps from being violated; and (3) preserves the benefit of the "regulatory out" provision of the LTPPA for the utility, in that the utility is not required to make payments to the suppliers under the LTPPAs for costs that the utility cannot recover through its tariffs (i.e., the utility will not be required to pay the suppliers under the LTPPA for curtailed RECs, but is allowed to recover, through its Section 16-111.5(l) tariff, the costs of the energy associated with the curtailed RECs). (RS Initial Brief at 32-33)

The RS says it is not seeking to revise, reinterpret, or renegotiate the LTPPAs, and the primary proposal does not require a revision, reinterpretation, or renegotiation of the contracts. The RS maintains the primary proposal does not require any changes to the text of the Curtailment Provision of the LTPPA. The RS asserts the primary proposal seeks a change in the curtailment methodology at the direction of the Commission, which is permitted by the Curtailment Provision, while preserving the protection of the statutory RPS rate caps for customers and the "regulatory out" protection of the Curtailment Provision for the utilities. (RS Reply Brief at 16)

The RS insists any suggestion that the LTPPAs were the product of arms-length negotiations between the LTPPA suppliers and the utilities would be erroneous. The RS notes the Commission found in the December Order that the RS is correct that the LTPPAs were not the result of arms length negotiations. (RS Reply Brief at 16-17)

According to the RS, ComEd attempts to create an impression that the LTPPAs were negotiated by asserting that their terms were openly and collaboratively developed by the IPA, its Procurement Administrator, the Procurement Monitor, Staff, the utilities and LTPPA suppliers. The RS contends the provisions of Section 16-111.5(e)(2) of the PUA preclude any inference that the LTPPAs were the product of arms-length negotiations between the LTPPA suppliers and the counter-party utilities. The RS says under this statutory provision: (1) The Commission is to receive all written comments that the Procurement Administrator receives on the contract form, but there is no requirement that the Commission do anything about those comments. (2) The Commission must resolve any disputes between the electric utility and the Procurement Administrator concerning the contract terms, but there is no corresponding provision for the resolution of disputes between prospective bidders and the Procurement Administrator (or the utility) concerning the contract terms. (3) Any negotiation by the winning bidders over the contract terms is expressly prohibited. (RS Reply Brief at 17)

In response to cases cited by ComEd, the RS claims this is not a situation in which the tribunal must adjudicate a dispute over the interpretation of a contract entered into between two commercial parties who negotiated the terms of the contract at arms-length. The RS asserts it is not contending that the Commission should interpret the Curtailment Provision in a way which is contrary to the plain and obvious meaning of its words, nor asking the Commission to "rewrite" the LTPPA provision to provide a better bargain for the LTPPA suppliers. The RS maintains that the Curtailment Provision specifies a default method for implementing curtailments, by reducing the quantity of "Product" (as defined in the LTPPA) purchased under the LTPPAs. In the RS view, the application of the default method of curtailment is conditioned by the words "Unless otherwise directed by the Illinois Commerce Commission," which provides for the Commission to direct that a curtailment be implemented in a different manner than the default method. (RS Reply Brief at 18)

The RS asserts ComEd is ignoring the plain and obvious meaning of the words in the Curtailment Provision. The RS says ComEd attempts to slough off the significance of the phrase "Unless otherwise ordered by the Illinois Commerce Commission" by asserting that this phrase only authorizes the Commission to direct that a curtailment be implemented on something other than a *pro rata* basis across all the LTPPAs. The RS claims this argument fails the most basic principles of contract interpretation. If the phrase were intended to be limited in its application in the way ComEd contends, it would have been placed later in the clause, so that it would have read: "Buyer shall reduce the quantity of Product purchased under all contracts for renewable energy resources allowing for *pro-ration* in this circumstance and that are effective and in force at the time by reducing proportionately, unless otherwise directed by the Illinois Commerce Commission, for each contract the Annual Contract Quantity or similar contract term . . . ." According to the RS, the words "Unless otherwise directed by the Illinois Commerce Commission," however, are placed at the start of clause (2) and therefore modify the entire clause "Buyer shall reduce the quantity of Product purchased under all contracts for renewable energy resources allowing for *pro-ration* in this circumstance and that are effective and in force at the time by reducing proportionately for each contract the Annual Contract Quantity or similar contract term as required such that the amount of expenditures for Product are recoverable." The RS says inclusion and placement of the phrase "Unless otherwise directed by the . . . Commission" requires the parties to the LTPPAs to accept and implement a method other than the default method for curtailments if directed by the Commission. (RS Reply Brief at 18-19)

The RS claims that contrary to ComEd's argument, adoption of the curtailment method proposed by the RS would not require the Commission to redefine the contractual term "Product." Rather, the RS says the Commission would be directing the utility to curtail a component of the LTPPA other than "Product" – specifically, REC purchases – to the extent necessary to keep the RPS rate caps from being exceeded. (RS Reply Brief at 19)

The RS believes that the Curtailment Provision of the LTPPA provides for the Commission to direct how a curtailment shall be implemented is fully consistent with both the context of the contract and the specific terms and intent of the Curtailment Provision. The RS says the procurement process to acquire supply to serve the utilities' eligible retail customers, the utilities' RPS obligations, the RPS rate caps, the other terms and conditions of the procurement process, and the resulting contracts, are all creations of the IPA Act and the PUA (or creations of the IPA and/or the Commission pursuant to the directives in the statutes). The RS claims the LTPPAs are a statutorily- and regulatorily-directed construct that the PUA specified the bidders were required to accept without “negotiations by winning bidders.” The RS contends it is consistent with the statutory basis of the LTPPAs that they authorize the Commission to determine and direct the nature, extent, and means of implementation of a curtailment in order to stay within the RPS rate caps, and require the parties to implement the curtailment in accordance with the Commission’s directions. (RS Reply Brief at 20)

The RS argues because the contractual right of the utility to curtail payments to the LTPPA suppliers to keep the RPS rate caps from being exceeded is entirely dependent on a determination by the Commission, it is therefore consistent with the purpose and intent of the Curtailment Provision that it specifies that the Commission may direct the manner in which a curtailment of purchases to prevent the rate caps from being exceeded shall be implemented. (RS Reply Brief at 20-21)

The RS says a related concern expressed by the witnesses for ComEd and the IPA is that adopting the RS’ primary proposal will inject uncertainty into future IPA procurements and would be unfair to the losing bidders in the December 2010 procurement. The RS insists it is not asking to have the LTPPA terms changed or renegotiated, and the Commission does not have to change or reinterpret the contract terms in order to adopt the RS' primary proposal. The RS claims the method of curtailment proposed in the primary proposal preserves the fundamental principles that (1) utility customers are not charged amounts for RECs in excess of the RPS cost caps, and (2) the utilities are not required to pay the LTPPA suppliers for costs that the utilities cannot recover through their tariffs. (RS Initial Brief at 33)

With respect to fairness to the losing bidders in the December 2010 procurement, the RS argues there is no evidence as to what the losing bidders had in mind or what prices they bid. The RS maintains a bidder that substantially raised its bid to take into account a perceived risk of curtailments would be in danger of having its bid rejected because it exceeded the regional competitive market price benchmarks established by the IPA, as required by both the IPA Act and the PUA. The RS submits that any prospective bidder in a future IPA procurement event for renewable resources will welcome adoption of the RS' primary proposal as restoring revenue certainty to long-term renewables supply contracts in Illinois and eliminating the curtailment of contracted energy that deprives the supplier of more revenues than necessary to comply with the RPS rate caps. (RS Initial Brief at 33-34)

ComEd asserts that at the time of the LTPPA procurement event, the bidders were informed and aware that in the event the RRB were exceeded, purchases of both RECs and the associated energy under the LTPPAs would be curtailed. The RS says the IPA makes a similar assertion but relies entirely on ComEd’s evidence. ComEd argues that the LTPPA procurement approved by the Commission in Docket No. 09-0373 was for bundled RECs plus energy, and that in the pre-procurement event activities in 2010, it was made clear to the bidders that the LTPPA procurement was for a bundled product consisting of both RECs and energy. In the RS' view, these are completely unremarkable observations that are uninformative on the issue at hand. The RS says everyone knew that the LTPPA procurement the Commission approved in Docket No. 09-0373 as part of the 2010 IPA Procurement Plan, was for long-term contracts for RECs plus energy; that was the objective of that component of the 2010 Plan. According to the RS, the fact that the LTPPAs were to be for RECs plus energy does not by itself shed any light on the understanding of how the curtailment provision was to operate in the event the RRB were to be exceeded, or what would need to be curtailed to keep charges to utility customers within the RPS rate caps. (RS Reply Brief at 12)

The RS believes information provided to the bidders in the information sessions prior to the December 2010 procurement event is consistent with an understanding that in the event the RPS rate caps were exceeded, only REC purchases under the LTPPAs would be curtailed. According to the RS, any inference suggested by the references ComEd cites that it was understood at the time of the LTPPA procurement event that all operations under the LTPPAs would be “bundled,” i.e., would affect both RECs and the associated energy in the same way, is contradicted by the record. RS says Mr. Gordon pointed out that the presentation slides from the pre-event bidder conferences included in ComEd’s exhibits in this case (as well as the actual ComEd LTPPAs), provide for separate methods for handling energy shortfalls and REC shortfalls. The RS says the presentation slides also describe separate credit requirements for the REC portion and the energy portion of the contracts. The RS claims these were indications that RECs and the associated energy were not to be treated together for all purposes under the contracts. (RS Reply Brief at 12-13)

The RS says its understanding is that the LTPPA would provide for reduction in payments to the LTPPA suppliers to the extent that the utilities could not, through their tariffs, charge their customers amounts that would cause the RPS price caps to be exceeded – is reflected in at least sixteen places in the RS' documents placed into the record by ComEd. (RS Reply Brief at 14-15)

The RS insists its primary proposal is consistent with this contemporaneous understanding of what the LTPPAs would provide with respect to curtailments. Under the primary proposal, the RS says purchases of RECs are curtailed if and to the extent necessary to prevent the RPS rate caps and the RRB from being exceeded, based on the imputed REC prices and the Appendix K calculation procedure the Commission has approved. The RS states under the primary proposal, the LTPPA suppliers do not receive payments pursuant to the contracts for RECs that would cause the RPS rate caps to be exceeded, because the utility is not allowed to recover, through a Section 16-111.5(l) tariff, renewables costs that would cause the RPS rate caps to be exceeded. However, the RS says the LTPPA suppliers would continue to deliver and be paid for the energy associated with the curtailed RECs, at the 2010 FEC price, since the energy contracted for under the LTPPAs has no impact on whether the RRB and the RPS rate caps are exceeded. (RS Reply Brief at 15)

The RS says Staff asserts that the RS' proposals are inconsistent with the benefit of just and reasonable rates, but provides no support or explanation for this assertion. The RS claims because its proposals would provide for the statutory RPS rate cap that limits the costs of renewable resources to customers to continue to be met, the proposals will result in just and reasonable rates. Staff also asserts that the RS have not shown how its proposals are consistent with ensuring that there is not undue discrimination in utility services. The RS says the primary proposal, however, spreads the costs of the LTPPAs fairly well over all the utility's sales customers, so that no discrimination issues are created. The RS states the secondary proposal uses an external funding mechanism, the accumulated ACP funds, to address the revenue shortfall caused by the current curtailment method, and thereby raises no discrimination issues. (RS Reply Brief at 24)

According to the RS, the IPA, in discussing the secondary proposal, states that it would not be able to use the RERF to purchase curtailed RECs at the price specified in the secondary proposal (Contract Price less DAH-LMP) because "[t]he RERF has a cost cap of the imputed REC price." The RS acknowledges that the Commission does not have authority to direct the IPA as to how to spend the RERF. The RS claims that under the secondary proposal, the Contract Price less the applicable DAH-LMPs becomes the imputed REC price for the purchase of curtailed RECs. The RS also says the imputed REC price, as referred to by the IPA, is a calculation of the IPA's own creation outside the four corners of the contracts. The RS asserts the only explicit price term in each LTPPA is its Contract Price that was bid and accepted in the original utility procurement. In the RS' view, the secondary proposal would not require the IPA to purchase curtailed RECs at prices in excess of the Contract Price (i.e., even if the DAH-LMP for an hour were zero, the price of the curtailed RECs generated in that hour would be the Contract Price). (RS Reply Brief at 27)

## III. STAFF'S POSITION

According to Staff, the RS' two proposals differ from the two-step procedure outlined in the approved IPA plan that includes: (1) curtailing quantities of both the energy swap portion and the REC portion of the LTPPAs; and (2) repurchasing unbundled RECs with funds already recovered from the utilities' hourly price customer through application of ACP rates. Staff asserts that to the extent the RS' proposals differ from the approved procedure, they require the utilities to incur additional costs equal to the revenue losses otherwise anticipated by the suppliers. (Staff Initial Brief at 4)

Staff believes there is also a possibility that the change in supplier revenues under the approved procedure is positive rather than negative. Staff says this means that there is also a possibility that the change in utility expenditures under the approved procedure is negative rather than positive. Staff expects that for the 2014 through 2015 contract period, the RS' proposals, if approved, would result in the utilities incurring additional costs. The existing tariffs would enable ComEd and Ameren to recover such additional costs from eligible retail customers. Therefore, Staff recommends rejecting the RS' proposals in their current form. (Staff Initial Brief at 4-5)

If the Commission approves the RS' primary proposal, then Staff recommends that any additional above-market priced expenditures for unbundled energy be paid for with ACP funds already collected from hourly-priced customers, rather than by increasing the rates of eligible retail customers. Similarly, if the Commission approves the RS' secondary, alternative proposal, then Staff recommends that any REC costs incurred by the utilities in excess of the budgeted amount be paid for with ACP funds already collected from hourly-priced customers. In either case, Staff recommends that the additional expenditures be limited by the amount of such ACP funds that have already been collected and are available. Staff claims this will ensure that the new contracts with the RS will not cause the statutorily-defined renewable energy price cap to be exceeded. (Staff Initial Brief at 5)

Staff states that RS witness Gordon claims that in 2010 when the RFP event for the LTPPAs was held by the IPA, he did not anticipate a “serious risk” that the LTPPAs could need to be curtailed due to the RPS price caps being exceeded. Staff believes this risk miscalculation is not a valid reason to insulate the RS or any of the suppliers from that risk. Staff argues that the RS seeking to do business with Illinois utilities knew or should have known that the RPS price caps would be exceeded if significant retail load migrated away from the utilities. Staff also asserts they knew or should have known that Illinois was a State committed to fostering retail competition. In its annual report, dated June 2010, the Commission’s Office of Retail Market Development was reporting about implementing new legislation designed to remove certain barriers to competition for residential and small commercial customers in Illinois, such as P.A. 95-0700, which required ComEd and Ameren to begin offering utility consolidated billing (“UCB”), the purchase of receivables (“POR”) and the purchase of two billing cycles of uncollectible receivables (“POU”). Staff insists they knew or should have known that the State had recently enacted a municipal aggregation law that made it easy for ARES to compete for and obtain large quantities of residential customers. Staff also contends they knew or should have known that the utilities were saddled with long-term fixed-quantity energy contracts with fixed prices well-above the current market, thus providing a golden window of opportunity for ARES to offer significant savings to retail customers. Staff says they were told in no uncertain terms that the winning bidders for the LTPPAs risked being curtailed due to the RPS price caps being exceeded. (Staff Initial Brief at 5-6)

According to Staff, even if the shift of retail load away from the utilities and the resulting drop in the utilities’ RPS budgets were entirely unforeseeable by the RS, unforeseeable risk is one of the things suppliers voluntarily accept when they participate in the IPA’s competitive procurement events. In the face of uncertainty, it is up to bidders to adjust their bids by a suitable risk premium. Staff asserts that even if the RS underestimated the risks involved with the LTPPA, perhaps due to underestimating the dynamic nature of the Illinois retail market, or were just willing to throw caution to the wind, those are not valid reasons to punish ratepayers by requiring them to spend more than the caps allow on renewable energy. (Staff Initial Brief at 6)

Staff argues that under the RS' proposal, even though the unbundled energy would not necessarily include its associated RECs, if the contract price is above average day-ahead LMPs, ratepayers will still be spending more than they otherwise need to spend in order to acquire energy. In other words, ratepayers would still be buying renewable energy resources at a price that exceeds market prices, to an extent that will cause their rates to exceed the statutorily-defined price cap. (Staff Initial Brief at 6)

Staff notes that the RS claims the LTPPAs provide an energy price hedge for eligible retail customers. Staff agrees; however, in Staff's view, it is not a particularly good energy price hedge, at least not to date. Staff states that in the 2012-2013 contract period, average day-ahead LMPs were significantly below both the LTPPA contract prices and the procurement administrator’s 2010 forward price for the same 2012-2013 period. Staff says for the current 2013-2014 contract period, it appears that average LMPs may not be significantly below (and could even be above) the procurement administrator’s forward price. In Staff's view, it appears from current futures prices that market participants expect LMPs to fall below the procurement administrator’s 2010 forward price again in the 2014-2015 and 2015-2016 contract periods. (Staff Initial Brief at 7)

According to Staff, a contract is a contract, and the utilities are contractually obligated to pay these above-market prices for the energy provided under the LTPPAs, to the extent required by the contracts. Staff states that the IPA procurement administrator presciently insisted on including in these contracts a circuit breaker, tripped if and when the LTPPA purchases cause the renewable energy budgets to be exceeded. Staff says the contracts provide for a partial curtailment of the quantities purchased to insure that retail rates are kept at or below the statutorily-defined price caps. In Staff's view, that was part of the original deal, and the Commission should assume as a matter of procurement policy that any risk premiums associated with the curtailment clause were included in the suppliers’ bids. Staff believes that authorizing any kind of repurchase of curtailed quantities from these suppliers can and should be viewed as completely optional. Staff argues the Commission need not accept new contract terms that are not in the best interest of ratepayers. Staff says the IPA and the Commission could instead use the ACP revenues from hourly price customers to buy RECs through a completely new RFP, with new bids at current market prices and capped at a current price benchmark, if the Commission determined that it would better serve the public interest. (Staff Initial Brief at 7-8)

Staff notes Mr. DiDonato testifies that Illinois does not meet his criteria as a good site for new wind generation development because it has become apparent in just a few short years that the benefit of the bargain will not be realized in Illinois now or for the foreseeable future, given the unexpected level of curtailments of the LTPPAs. Staff says he concludes his testimony by saying that his company intends to pursue new renewable energy development in other states in the United States, but not in Illinois so long as it is unable to realize the benefit of the bargain under long-term agreements. While it is unclear to Staff exactly what Mr. DiDonato means by unable to realize the benefit of the bargain, Staff does understand his cautiousness about making investments in Illinois, if the profitability of those investments were to rest entirely (or almost entirely) on contracts such as the LTPPAs, which enable the utilities to cut back on purchases due to the Illinois rate cap. Staff argues the curtailment clauses of the LTPPAs are just one of the mechanisms with which the Commission has attempted to juggle the array of competing objectives set forth in the governing statute. (Staff Initial Brief at 8-9)

Staff also notes that neither of the two Illinois RPSs requires that renewable energy resources be located within Illinois. Staff says the RPS applicable to utilities expresses a preference that resources be located within Illinois or the six states that adjoin Illinois. Staff adds that the RPS applicable to ARES only requires that the resource be located within the footprint of PJM Interconnection, L.L.C. (“PJM”) and the portion of the Midcontinent Independent System Operator, Inc. (“MISO”) (f/k/a Midwest Independent Transmission System Operator, Inc.) that lies within the United States. Staff says together that footprint encompasses all or parts of 27 different States and the District of Columbia. Staff indicates Mr. Whitlock states that the company he works for has had in excess of 500 MWs of projects in Illinois that are near construction-ready, with transmission agreements signed, many years of meteorological data compiled to measure the wind speeds, and local permits secured, but that with increasing concerns relating to the current Illinois RPS procurement situation that does not offer any prospects for additional long-term contracting in the foreseeable future, and with the LTPPAs now being curtailed, Illinois has become a much less attractive market. He adds that as a result, it has not proceeded to construction on any of these projects, and it currently has no projects under construction in Illinois. Staff indicates Mr. Thumma testifies that the RS should be “made whole” under the LTPPAs (suffer no revenue losses from curtailments) because Illinois has set a 25% renewable energy goal by 2025, and potential investors will only initiate new renewable energy projects sufficient to reach that goal if they believe they can recover their capital costs and earn a reasonable, risk-weighted rate of return. (Staff Initial Brief at 9-10)

Staff maintains that the Illinois statute contains many competing goals and requirements, and building wind farms within Illinois does not work to the exclusion of other competing goals and requirements. In Staff's view, it must coexist within a bifurcated two-RPS system (which is subject to a renewable energy budgetary cap tied to ratepayer usage) and alongside a dynamic and competitive retail electricity market. Staff also maintains that neither of the two Illinois RPSs requires that renewable energy resources be located within Illinois. (Staff Initial Brief at 10)

Staff contends there are other reasons why a company might rethink plans to build new generating facilities at any given location. Staff suggests a company might look at energy prices. All else equal, Staff says low electricity prices would discourage new investment in generating equipment (including wind farms). Staff notes Illinois has low wholesale energy prices relative to other States. According to Staff, low fossil fuel prices would discourage new investment in non-fossil fueled renewable energy facilities (like wind farms). Staff also says low capacity prices (e.g., payments to generators by Regional Transmission Organizations ("RTOs") for making generating capacity available) would also discourage new investment in generating equipment (including wind farms). Staff believes reacting to such incentives is part of the normal operation of an efficient market. (Staff Initial Brief at 10)

Mr. Thumma identifies three primary revenue streams for wind energy projects: (1) federal tax incentives in the form of a production tax credit and accelerated depreciation; (2) wholesale energy, sold at a market determined price, and; (3) renewable energy certificates He also mentions that a production tax credit of $23 per MWh has expired except for projects that have already begun construction. Staff asserts Mr. Thumma omits additional revenue streams, however. Staff says wind farms can also earn revenue by providing “capacity services” to PJM or MISO. Staff also claims the accelerated depreciation allowed for wind farm investments is considerably more generous than the accelerated depreciation allowed for fossil fuel generating plant investments. To investors, Staff says these deferred taxes have a considerable net present value that can rival that of a $23 per MWh production tax credit. While deferred taxes are not a revenue source, Staff contends they can be thought of as zero percent loans from the government. (Staff Initial Brief at 10-11)

According to Staff, Mr. Thumma states, “It is my understanding that ARES are primarily buying RECs on the spot market or for very short terms in order to fulfill their RPS obligations.” Staff notes Mr. Thumma testifies that long-term contracts provide two potential benefits for electricity consumers: lower costs and lower risk. In Staff's view, the retail electricity market in Illinois appears very competitive and it is expected that ARES seek to maximize profits. If Mr. Thumma is correct that ARES are primarily buying RECs on the spot market or for very short terms in order to fulfill their RPS obligations, then Staff suggests there is probably a good reason for it. Staff asserts one likely possibility is that ARES have decided it is less expensive and/or less risky to purchase RECs on the spot market or for very short terms than to enter into long-term contracts for RECs or RECs bundled with energy. (Staff Initial Brief at 11)

With respect to cost so far, Staff contends the experience of ComEd and Ameren has been that 1-year contracts for unbundled RECs have been less expensive than the LTPPAs. Staff concedes there are still another 18 years left under those contracts, so one cannot directly compare the ultimate cost of the LTPPAs over 20 years to 20 years of contemporaneous 1-year unbundled REC contracts. With respect to risk, generally Staff says long-term contracts reduce exposure to unexpected and adverse changes in market prices. In this instance, Staff claims this refers to changes in both the price of RECs and the price of electricity. Staff avers an excess of long-term contracts with fixed quantities can increase risk, if the utility loses enough load to ARES. (Staff Initial Brief at 11-12)

Staff notes Mr. Thumma, Mr. Whitlock, and Mr. DiDonato testify that both the RS' primary and secondary proposals make the suppliers "whole." In other words, they would earn the same revenue as they would if there were no curtailments. According to Staff, this implies that if the revenues to the RS do not fall (i.e., they are as they would be with no curtailments), then the costs to the utilities do not fall. Staff states that unless some of these costs are recovered from someone other than eligible retail customers, the total cost to eligible retail customers will be the same as they would be with no curtailments. Staff also states that the use of ACP revenues from hourly-customers to buy back curtailed RECs was not proposed until 2012 (well after the 2010 contracts were developed). Staff asserts that in 2010, when the LTPPAs were developed and approved by the Commission, it is reasonable to surmise that the curtailment clause was intended and expected to reduce costs incurred by the utilities and recovered solely from eligible retail customers. Staff contends the curtailment clause was not developed and approved by the Commission with any intention or expectation that the clause's invocation would leave costs unchanged. In Staff's view, there was no intention or expectation that the RS would be "made whole" at each curtailment. Staff claims if there was such an intention or expectation, then there would have been no point to have the curtailment clause. (Staff Initial Brief at 12)

According to Staff, the only way to keep eligible retail customers "whole" is either to reject the RS' proposals, or to pay for the additional costs from some other source than eligible retail customers' rates. Staff suggests, assuming the RS' primary proposal is accepted, any additional above-market priced expenditures for unbundled energy could be paid for with ACP funds already collected from hourly-priced customers. Assuming the RS' secondary, alternative proposal is accepted, Staff says any REC costs incurred by the utilities in excess of the budgeted amount could be paid for with ACP funds already collected from hourly-priced customers. In either case, Staff recommends that the additional expenditures be limited by the amount of such ACP funds that are available. Staff insists this would ensure that the new contracts with the RS will not cause the statutorily-defined renewable energy price cap to be exceeded. (Staff Initial Brief at 13)

Staff indicates Mr. Reed says that the RS' proposals satisfy the "no harm" standard. Staff disagrees. In reaching this conclusion, Staff says Mr. Reed admits that he is relying entirely on the testimony of Mr. Gordon, where, purportedly, Mr. Gordon establishes that the proposals would not result in charges to eligible retail customers of the electric utilities that exceed the statutory RPS rate cap. Staff claims Mr. Reed merely attaches a new label -- the satisfaction of a no harm standard -- to Mr. Gordon's claims. Staff notes Mr. Reed also says that the RS' proposals are "in the public interest" because they provide the greatest benefit to the greatest number of citizens of Illinois. He enumerates the factors that determine "benefit" in this context as (1) just and reasonable rates, (2) renewable energy development, (3) ensuring that there is no undue discrimination in utility service, (4) economic development, and (5) environmental protection. Staff believes the RS' proposals are not in the public interest. Staff argues that Mr. Reed has failed to demonstrate that the RS' proposals maximize these enumerated five benefits, and the proposals are inconsistent with the benefit of just and reasonable rates. (Staff Initial Brief at 13-14)

In Staff's view, Mr. Reed does not show that the RS' proposals are consistent with the benefit of renewable energy development. Staff says Mr. Reed notes that the State's RPS requirements began at 2% of energy usage and grow to 25% of energy usage by 2025, which he concludes, will require extensive development of renewable energy generating facilities to be achieved. Staff says he then testifies that the State has approximately 3,600 MW of installed wind turbine generating capacity and another 8,000 MW will be needed to meet the Illinois renewable energy requirements by 2025. (Staff Initial Brief at 14)

Staff paraphrases Mr. Reed to say that to ensure Illinois RPS goals are satisfied in the future, the Commission now must assure companies it is profitable to enter into long-term contracts with Illinois utilities, even if that requires the Commission to grant concessions to the RS; the LTPPAs need to be profitable at any cost, even if that means the Commission must supplement the RS' revenue streams with "make whole" addendums. (Staff Initial Brief at 14-15)

It is Staff's position that the Commission need not shoulder such burdens. In Staff's view, what Mr. Reed may not appreciate is that Illinois, starting with the Electric Service Customer Choice and Rate Relief Law of 1997 ("the 1997 Law"), took a bold step away from Commission-directed planning of in-state generation investments by utilities and toward greater reliance on competitive forces operating within regional markets. Staff claims this sea change is exemplified by (a) the 1997 Law's repeal of Section 8-402 of the Act ("Comprehensive utility energy plan"); (b) its addition of Section 16-111(g), which includes provisions that made it easy for utilities to retire, sell, assign, lease or otherwise transfer generating assets to affiliated or unaffiliated entities; (c) its addition of Section 16-126, which requires that each utility join an independent system operator (or, as later amended, a regional transmission organization); and (d) its legislative findings, in Section 16-101A of the Act, which cites to "competitive forces" and "increasing competition." Staff also says the IPA Act charged the IPA and the Commission, not with entering into a new "regulatory compact" with a new class of generation-only public utilities, but simply with assuring that the utilities act upon the receipt of arms-length competitive bids. (Staff Initial Brief at 15)

Assuming that Mr. Reed's capacity figures are reasonably accurate, Staff says the wind-generated electricity associated with all that needed capacity amounts to 18.75% of the total energy demand of ComEd and Ameren customers (that is, 25% of at most 75%, which is the wind proportion requirement under the RPS for utilities). Staff asserts that leaves at least 75% of energy demand that must be satisfied by all other energy suppliers, and yet Illinois government has no explicit plan to insure that enough capacity will exist in 2025 to generate that larger fraction. Staff states that the IPA is not proposing and the Commission is not entertaining supplementing the income of any other generating companies within PJM and MISO or just within Illinois, even though some of those companies could be experiencing lower revenues due to lower-than previously expected spot prices for energy. In Staff's view, simply identifying for the Commission the number of MWs of wind-powered generating capacity that may (or may not) be required by 2025 does not establish that the RS' proposals are necessary or desirable in order to achieve the State's RPS goals. In the context of a power generation industry increasingly devoid of regulatory compacts because States like Illinois have legislated greater reliance on competitive forces, Staff believes the Commission need not ensure the profitability of suppliers in either the short-run or the long-run. (Staff Initial Brief at 15-16)

Staff contends Mr. Reed does not show that the RS' proposals are consistent with the benefit of ensuring that there is no undue discrimination in utility service. After including it in his list of factors that are relevant to assessing public benefits, Staff says he does not mention the concept of undue discrimination in utility service, let alone tie it to the RS' proposals. (Staff Initial Brief at 16)

According to Staff, the RS' proposals are inconsistent with the benefit of economic development. Staff says Mr. Reed essentially makes the same argument that he makes in the context of the benefit of renewable energy development. Staff states that Mr. Reed also testifies that renewable energy projects are labor-intensive and rely on many components that are manufactured in the U.S. He also testifies that more jobs per unit of electricity are created through renewable energy-fueled electricity generation than through fossil-fueled electricity generation. He also testifies that renewable energy development primarily takes place in rural areas where it can stimulate economic activity, create jobs and steady property tax revenues, and support vital services. (Staff Initial Brief at 16-17)

Staff suggests if policy-makers want to focus on labor intensity and attempt to maximize the number of jobs per unit of electricity, then wind-powered generation may be the wrong technology to focus upon. Staff argues that if a criteria for technology adoption were job-years per gigawatt-hour, wind-power generation would not be the most preferred technology. Staff claims all else equal, job-years per gigawatt is an indicator of inefficiency. As a matter of policy, Staff believes the Commission should not provide preferential treatment on the basis of technological inefficiency (i.e., the Commission should not, all else equal, favor a generation technology because it consumes more resources per gigawatt-hour than other competing technologies). (Staff Initial Brief at 17)

Staff notes that IPA witness Star made three recommendations to the Commission. First, arguing that it is not in the public interest, he testified that the Commission should reject the RS' request to not curtail the energy component of the LTPPA procured by the IPA in December, 2010. Second, he recommended that the Commission consider the RS' alternative proposal of utilizing a floating REC price for the purchase of curtailed RECs, but that any additional payments to the RS should only come from the hourly ACP funds held by the utilities, and that a system should be developed to ensure proper administration of any purchases. Third, Mr. Star recommended that, in general, the Commission should remain open to ideas for increasing incentives for renewable energy development. (Staff Initial Brief at 19)

According to Staff, the IPA, Ameren, ComEd, and Staff all agree that the RS' primary proposal should be rejected. Staff believes that to the extent to which the issue was addressed, they also all agree that, if either of the RS proposals is accepted, any additional utility payments to the RS should be limited to the funds already collected from the utilities' hourly customers through application of ACP rates. (Staff Initial Brief at 19)

Staff disputes the RS' assertion that its primary proposal preserves the customer protections of the statutory RPS rate caps. Staff says the RS bases its conclusion on the premise that the appropriate comparison for determining whether utility customers are harmed by the RS' primary proposal is a comparison of what customers pay if there is no curtailment versus what they pay under the proposal if there is a curtailment. Staff believes this is incorrect. Staff asserts the statute requires the Commission to prevent rate increases - due to purchases of renewable energy resources – in excess of 2.015% of the amount paid per kWh for electricity service during the planning year ending May 31, 2007. Staff claims that is the only "appropriate comparison" that can be relevant in this instance. Staff contends that if the RS' primary proposal is accepted, and if actual Day-Ahead Hourly Locational Marginal Prices in the load zone applicable to the LTPPAs remain below the 2010 forward curve (as appears most likely), then ratepayers will experience a rate increase in excess of the 2.015% cap. In Staff's view, that is an unalterable mathematical fact. (Staff Reply Brief at 1-2)

Staff notes the RS asserts that customers pay less under the current method than they would under the RS' primary proposal solely because the current method curtails more payments to the LTPPA suppliers than is necessary to prevent the RPS rate caps from being exceeded. Staff again believes the RS are incorrect. Staff asserts that if, as the RS seems to believe, the actual Day-Ahead Hourly Locational Marginal Prices in the load zone applicable to the LTPPAs constitute a more proper dividing line for determining where the cost of energy ends and the cost of RECs begins, then the curtailments needed to prevent ratepayers from experiencing a rate increase in excess of the 2.015% cap would be above (not below) the curtailments contemplated by the Commission-approved Appendix K of the 2010 IPA plan. (Staff Reply Brief at 2)

According to Staff, the RS wants the size of the bundled product curtailments to be based on the highest value of market energy prices as possible, since this deflates the implicit cost of RECs and leads to a smaller curtailment. Staff says, at the same time, it wants the payment for any unbundled energy still purchased to be settled at the lowest value of market energy prices as possible, since this maximizes suppliers' revenues from those unbundled energy sales. Staff says the end result is the suppliers are made "whole." Staff argues that, inescapably, that means that ratepayers pay the same amount that they would have paid had there been no curtailments. Staff asserts there are no curtailments under the RS' primary proposal. In Staff's view, ratepayers experience the same rate increase, in excess of 2.015%, as if there were no curtailment clause in the LTPPAs. Staff says the RS expects the Commission to believe that ratepayers are not harmed and still protected by the statutory RPS rate caps. Staff believes the RS' position does not add up. (Staff Reply Brief at 3)

Staff contends that under the RS' primary proposal, not only do ratepayers spend in excess of 2.015% due to these contracts, the RS retains all the curtailed RECs and would be free to market them elsewhere. Staff claims ratepayers would be paying something for nothing. Staff expresses surprise the RS actually argues that, since ratepayers would not be receiving RECs, they could not be paying in excess of 2.015% for RECs, and that therefore the spending cap associated with the Illinois RPS would not be exceeded. In Staff's view, this is a new twist on a “rose by any other name,” except this one does not smell as sweet. Staff asserts that by the same flawed logic, if 100% of the RECs were curtailed, but, pursuant to the RS primary proposal, none of the energy was curtailed, the premium above market prices for that energy would deplete none of the utility’s renewable energy resource budget. (Staff Reply Brief at 3-4)

Staff indicates the RS argues that its primary proposal is in the public interest because it will restore the confidence of renewable energy developers and investors in entering into long-term supply contracts to serve the Illinois market and in developing new wind generation facilities in Illinois and to serve the Illinois market. Staff argues that the “public interest” is not measured by the confidence levels of renewable energy developers and investors. Staff says the IPA Act and PUA contain many competing goals and requirements. Staff maintains wind farm development within Illinois is not a sacrosanct position among those competing goals and requirements in the IPA Act and PUA. (Staff Reply Brief at 4-5)

Staff agrees with ComEd that the RS' primary proposal also makes bad business sense as it cuts against the integrity of the contracting process in Illinois procurements. Staff says the IPA elaborates on this issue, stating that the RS' proposal would be contrary to the PUA mandate for IPA procurements on behalf of eligible retail customers, specifically citing the “clear requirement … that all disputes on contractual terms must be resolved by the Commission before winning bidders sign the contracts, after which ‘the contracts shall not be subject to negotiation’ and ‘the bidders must agree to the terms of the contract in advance.'” (Staff Reply Brief at 5)

The RS also points to the environmental benefits of renewable energy. While Staff does not dispute that some forms of renewable energy production may be more benign to the environment than some forms of non-renewable energy production, Staff claims the RS has shown no clear link between its proposals and the attainment of these environmental benefits. Staff says the IPA raises significant reasons, independent of the LTPPAs, for the recent wane in interest for renewable energy projects in Illinois. According to Staff, the General Assembly did not intend to give the Commission *carte blanche* to pursue the environmental benefits of renewable energy, as evidenced by the 2.015% rate increase cap. (Staff Reply Brief at 6)

The RS also maintains that long-term supply contracts will produce lower RPS compliance costs, thereby benefitting electricity consumers. Staff questions this theory and notes that with respect to cost, so far, the experience of ComEd and Ameren has been that 1-year contracts for unbundled RECs have been less expensive than the LTPPAs. Staff suggests ARES also find short-run contracting for RECs to be less expensive. Staff says the IPA's explanation for this seems to be that the Illinois REC market is oversupplied with low cost wind RECs (from Illinois and other qualifying states). (Staff Reply Brief at 7)

## IV. THE IPA'S POSITION

The IPA states that the RS' primary proposal would be a departure from the previous Commission approach and would require reinterpretation of the LTPPAs. The IPA says the question before the Commission is whether such a move would be in the "public interest" or "harm utility customers." In the IPA's view, the evidence shows that the public interest is not served by reinterpreting the contracts, because the primary proposal is inconsistent with legislatively mandated requirements of the IPA procurement process, which in turn could harm eligible retail customers by adding uncertainty to future procurements. The IPA says the RS' primary proposal may help the individual LTPPA counterparties, the owners of now existing renewable generation, but does little to provide incentives for new renewable development in Illinois as claimed by the RS. In the IPA's view, the primary proposal should be rejected. (IPA Initial Brief at 3-4)

The IPA believes the RS' secondary proposal does not harm utility customers. The IPA says, provided that it is narrowed to conform with existing statutory mandates and has a methodology to prevent over-compensation, the IPA supports this approach. The RS has proposed a methodology, to which the IPA has no objection. As long as the RS' secondary proposal is limited to use of the utility-held hourly customer ACP funds, the IPA supports the RS' secondary proposal. (IPA Initial Brief at 4)

The IPA believes the public interest is best served by maintaining the status quo of curtailing energy in proportion to RECs under the LTPPAs. The IPA says because the LTPPAs apply to a fixed number of newly constructed renewable generation facilities, in future procurements, the IPA could propose, or the Commission could order, different curtailment language, the Commission should focus on the costs and benefits of potentially rewriting IPA-procured contracts due to one party's economic loss and the actual costs of potentially curtailed energy to ratepayers. In the IPA's view, both factors weigh in favor of the Commission not rewriting the LTPPAs to avoid energy curtailment. (IPA Initial Brief at 4)

The IPA says the Commission has already found that the plain language of the LTPPAs requires curtailment, and rewriting IPA-procured contracts after the fact could severely damage the IPA procurement process. The IPA asserts such an approach would be contrary to the PUA mandate for IPA procurements on behalf of eligible retail customers. (IPA Initial Brief at 5, citing Section 16-111.5(e)(2) of the PUA)

In the IPA's view, the clear requirement is that all disputes on contractual terms must be resolved by the Commission before winning bidders sign the contracts, after which the contracts shall not be subject to negotiation and the bidders must agree to the terms of the contract in advance. The IPA believes there would be serious policy ramifications for renegotiating IPA-procured contracts after the fact, upsetting a fair and transparent approach that meets the goals of the PUA and IPA Act. The IPA says under the current system, the playing field is level, and every entity can assess risk based on the same contract terms while every winning bidder’s rights and obligations were known and agreed to when they voluntarily placed their respective bids. The IPA says in multiple bidder presentations bidders were informed prior to submitting bids that once finalized, the contract terms would not be subject to negotiation by winning bidders. (IPA Initial Brief at 5-6, Reply Brief at 1)

The IPA states that in the present docket, the Commission acknowledged that the proper interpretation of the LTPPAs is that energy is to be curtailed, but the Commission also faced the question of whether to unilaterally change the terms of the contract to favor one party over the other party to the contract. The IPA says the Commission found that the definition of Product contained in the LTPPAs specifically included both the energy and REC component and that definition was accepted by both parties to the LTPPAs, and the curtailment provision addressed curtailment of “Product.” In the IPA's view, ComEd has presented substantial evidence that the LTPPA counterparties knew or should have known that the curtailment provision contemplated curtailment of energy in addition to RECs. The IPA believes subsequent discomfort with any particular provision should not convince the Commission to unilaterally change the contractual terms. According to the IPA, there is no question that every winning bidder’s rights and obligations were known and agreed to when they voluntarily placed their respective bids. (IPA Initial Brief at 6)

The RS argues that the energy component of the LTPPAs act as a hedge against higher energy prices for eligible retail customers, thus providing a customer benefit. The IPA states that it did not consider using LTPPAs for renewable resource (particularly wind resources) as price hedges at the time it proposed the LTPPAs, and has not considered, and does not anticipate considering, using such an approach. The IPA says available empirical data supports the IPA’s position: the monthly cost or benefit of the hedge to eligible retail customers during the life of the LTPPAs show that not all months are losses for customers, but to date, on average customers are taking a loss on these contracts. The IPA says it, Staff, Ameren, and ComEd all agree consumers have not benefitted from using the LTPPA as an energy price hedge, and that not curtailing energy will increase the harm to eligible retail customers. Assuming current energy price trends continue over the upcoming delivery year, the IPA asserts energy curtailment would shelter eligible retail customers from taking larger losses; as a result, it would harm those same customers if the Commission reversed the curtailment. (IPA Initial Brief at 7, Reply Brief at 2)

The IPA says several RS witnesses make the claim that reinterpreting the LTPPAs to prevent curtailment of energy will help development of renewable energy in Illinois, but this claim should be rejected. In the IPA's view, the question of how to develop additional renewable energy in Illinois is a critical question, but the limited scope of this docket renders it an inappropriate place to fully address that and other questions of how to satisfy the Illinois RPS' goals. The IPA believes that the question of energy curtailment is less critical than several other factors in the lack of new renewable development in Illinois. (IPA Initial Brief at 8)

The IPA asserts that as an agency it is significantly invested in Illinois based renewable development, as well as the other goals of the Illinois RPS. Despite the RS' testimony that the curtailment issue is preventing them from further development in Illinois, the IPA believes that the question of curtailing energy from existing LTPPAs with existing facilities is largely irrelevant to this question. The IPA has identified several factors that it believes are of more importance to the development of renewable resources in Illinois. (IPA Initial Brief at 8)

The IPA believes that the most important reasons that little renewable development occurred in Illinois in 2013 and several RS witnesses averred that they are no longer interested in building in Illinois right now are:

- The Illinois REC market is "oversupplied" with low cost wind RECs (from Illinois and other qualifying states);
- The Renewable Resources Budget anticipated to be at or near its cap for the next several years for both utilities; and
- The Renewable Resources Fund requiring a parallel utility procurement.

The IPA believes these are all significant challenges that will not be resolved by rewriting the LTPPAs. The IPA further notes that if a developer managed to secure a long-term contract with an entity in this climate (i.e. when there are no funds available under the Renewable Resources Budget and the Renewable Energy Resources Fund cannot be spent), it would not be IPA procured, and thus subject to arms-length negotiated curtailment provisions. (IPA Initial Brief at 8-9, Reply Brief at 2)

The IPA asserts that given the experience of the last year with curtailment, the Commission or IPA may consider different curtailment language in future contracts to insulate against future disputes. The IPA says neither it nor the Commission are bound to recommend or order the same contract language in subsequent procurements. According to the IPA, at minimum, comments on future long-term renewable contract language would be germane during: the comment period pursuant to Section 16-111.5(o) of the PUA, the public comment period for any IPA Procurement Plan that recommends a renewable procurement, the docketed proceeding to approve that Procurement Plan, and pre-procurement bidder comments to the Procurement Administrator. The IPA believes the RS and similarly situated entities do and will have ample opportunities to raise issues related to future curtailment provisions. (IPA Initial Brief at 9)

The IPA contends that pursuant to Section 1-75(c)(3) of the IPA Act, the IPA may not restrict its procurements on behalf of eligible retail customers to Illinois-based facilities. The IPA says even if this curtailment issue were entirely resolved to the satisfaction of the RS it does not guarantee that there will be future development of renewable energy resources in Illinois to meet the future Illinois RPS goals. The IPA suggests some or even most of the development could occur in other states. (IPA Initial Brief at 10)

The IPA says the Ameren and ComEd LTTPAs themselves are for facilities in Illinois, Indiana, and Iowa. The IPA claims any change to the LTPPAs of the present or future will, at best, encourage more bidders in the procurement process, but not necessarily more bidders pursuing new projects located in Illinois. (IPA Initial Brief at 10)

The IPA believes that new development of renewable resources in Illinois helps meet several important goals including, increasing diversity in the supply portfolio, and reducing emissions from fossil fuels generation necessary to meet supply needs. The IPA claims the renewable portfolio standard, along with programs to provide incentives for energy efficiency, demand response, and energy storage, is a significant part of how Illinois reaches these goals. The IPA asserts these goals are not always aligned, including with other portions of the IPA's mission to acquire adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability. In the IPA's view, rewriting the LTPPAs held by existing facilities to make energy uncurtailable would not necessarily have any environmental benefits, but due to the impact on eligible retail customers, it would harm the IPA's mission of "lowest total cost over time." (IPA Initial Brief at 10-11)

The IPA concludes that if the Commission adopts the RS' primary recommendation, there is no guarantee or assurance that there will be a positive effect on future Illinois-based development. The IPA asserts that to the extent there is a positive impact, it is not possible to quantify *a priori* and thus judge whether any Illinois-specific benefits outweigh the costs. To the extent that the Commission agrees with the RS and the IPA that there are public interest benefits to attracting new renewable development to Illinois, the IPA has identified several significantly more important barriers than the existing curtailment provisions. The IPA understands that the scope of the present docket is too limited to fully address those barriers, but pledges that it will be an active participant in any Commission-centered discussions as it has in previous regulatory and legislative discussions about the Illinois RPS. (IPA Initial Brief at 11)

The IPA insists the RS' argument that making energy uncurtailable would not require a change in the LTPPA contracts lacks merit. In the IPA's view, this misreads the LTPPAs. According to the IPA, the contract language prevents Ameren and ComEd from unilaterally curtailing Product without Commission approval to do so. The IPA asserts that if in the process of setting the terms of the curtailment the Commission changes the definition of "Product" to divorce RECs and energy, the Commission would certainly be changing a key term of the LTPPA. The IPA says if "unless otherwise directed by the Illinois Commerce Commission" allows changing contract terms, as the RS argue, the RS could conceivably ask for (and receive) changes to the price paid by eligible retail customers for non-curtailed energy. The IPA is concerned such an approach would raise significant policy and statutory compliance concerns. (IPA Reply Brief at 2)

According to the IPA, the LTPPA counterparties knew or should have known that curtailment was possible. The IPA also claims Commissioner Elliott's dissent raised the potential issue of "stranded costs" under the LTPPAs due to customer migration. In litigation of the IPA's 2011 Procurement Plan, and before the LTPPA procurement, the IPA says ComEd argued that 50% of eligible retail customers may leave bundled service, although at least one current member of the RS rejected that argument. (IPA Reply Brief at 2-3)

The IPA believes that unlike the RS' primary proposal, the alternative proposal does not require the LTPPAs to be rewritten or for eligible retail customers to incur financial burdens. As a result, the IPA supports this approach. Due to statutory and practical constraints, the IPA says it can support the RS' alternative proposal if only hourly ACP funds are used and the Commission adopts a methodology to determine the proper price for each REC. (IPA Initial Brief at 11)

Citing Section 1-75(c)(5) of the IPA Act, the IPA says regarding the first constraint, there is wide-ranging discretion on spending of the hourly ACP funds and the IPA says it is required to increase its spending on the purchase of renewable energy resources to be procured by the electric utility for the next plan year. The IPA says that in contrast, Section 1-56(d) of the IPA Act requires that the price paid to procure renewable energy credits using monies from the Renewable Energy Resources Fund shall not exceed the winning bid prices paid for like resources procured for electric utilities. The IPA states the RERF has a cost cap of the imputed REC price, while the hourly ACP funds have no such cost cap. As a result, the IPA believes that the Commission could order it to spend utility-held hourly ACPs on RECs at a price different from what eligible retail customers pay. The IPA says if the RS required a price for curtailed RECs that averaged to $10 extra per REC, the Commission could authorize that payment. The IPA notes that the Commission held in Docket No. 12-0544, the Commission does not have the authority to order the IPA to do so with the RERF, and the IPA believes it is statutorily barred from such a transaction. (IPA Initial Brief at 12, Reply Brief at 3)

Regarding the second constraint, in the event that the Commission approves the RS' alternative recommendation, the IPA requests that the Commission approve a methodology to ensure each LTPPA counterparty is properly compensated. The IPA views the RS' alternative recommendation as approaching the LTPPA like a cost-based contract, and the secondary mechanism should strive to prevent over- or under-recovery. Responding to the IPA's request for a methodology, RS witness Gordon identified a methodology in his Rebuttal Testimony that appears to take into account the questions raised by the IPA and Staff. The IPA has no objection to the Commission adopting this methodology. (IPA Initial Brief at 12-13)

## V. COMED'S POSITION

ComEd states the agreements at issue are the product of the 2010 procurement plan considered in Docket No. 09-0373, wherein the Commission approved the IPA's proposal to procure long-term renewable energy resources by way of 20-year power purchase agreements known as LTPPAs. ComEd says the statutory basis for including the procurement of renewable energy resources in a procurement plan is Section 1-75(c) of the IPA Act, which establishes a statewide Renewable Portfolio Standard. ComEd indicates that provision states that "procurement plans shall include cost-effective renewable energy resources," and includes a schedule setting forth "the percentage of cost-effective renewable energy resources" to be acquired over time. ComEd notes the RPS requirements are subject to an annual "cap" established in Section 1-75(c) wherein the total renewable energy resources to be acquired in any single year are to be "reduced by an amount necessary to limit the annual estimated average net increase due to the costs of these resources" paid by eligible retail customers to specified limits. ComEd indicates the IPA's current Commission-approved Plan in this docket recognizes curtailment of purchases under the LTPPAs will be necessary during the 2014-2015 procurement year in order to respect this statutory rate impact cap. (ComEd Initial brief at 2-3)

ComEd claims the terms of the LTPPAs at issue define that curtailment. ComEd contends those terms were openly and collaboratively developed in accordance with Section 16-111.5(e) of the PUA by the IPA's Procurement Administrator, NERA Economic Consulting, Inc. ("NERA"), in consultation with the IPA, Staff of the Commission, the Procurement Monitor, and various interested parties, including the RS and ComEd. (ComEd Initial Brief at 3-4)

According to ComEd, the LTPPA precisely defines the "product" being purchased and sold, and includes a detailed description of the manner in which the delivery amounts must be curtailed in the event the rate cap limitation is triggered. Specifically, in the event the rate cap is exceeded, ComEd says the contract terms require the following process be followed:

> 2) unless otherwise directed by the Illinois Commerce Commission or statute, Buyer shall reduce the quantity of Product purchased under all contracts for renewable energy resources that allow for *pro-ration* in this circumstance and that are effective and in force at the time by reducing proportionately for each contract the Annual Contract Quantity or similar contract term as required such that the amount of expenditures for Product are recoverable; and 3) Buyer will provide notice to Seller each time a change is made to the Annual Contract Quantity under this provision. Each time Seller receives a notice from Buyer pursuant to

> clause (3) of the preceding sentence, Seller shall have thirty (30) days thereafter to provide notice to Buyer of (a) its election to terminate this Agreement effective no later than 60 days after Seller's notice to Buyer of such election; (b) its election to reduce permanently the Annual Contract Quantity to the reduced level contained in Buyer's notice effective when the reduction is scheduled to take place; or (c) its election to accept the reduced Annual Contract Quantity contained in Buyer's notice for that Delivery Year. In the event that the Seller accepts the reduced Annual Contract Quantity contained in Buyer's notice pursuant to clause (c) of the immediately preceding sentence, the Applicable Percentage shall be reduced proportional to the reduction in the Annual Contract Quantity for that Delivery Year. In the event that the Seller accepts the reduced Annual Contract Quantity contained in Buyer's notice pursuant to clause (b) above, the Applicable Percentage shall be reduced proportional to the reduction in the Annual Contract Quantity.

ComEd asserts the standard terms of each LTPPA define the "Product" to be curtailed to include both the energy and the associated REC:

> "Product" means Illinois or Adjoining State Wind, Illinois or Adjoining State PV, Illinois or Adjoining State Other RER, Other State Wind, Other State PV or Other State Other RER, as indicated in this Confirmation, and includes both the energy and the associated REC. Capacity is not included in the Product and Seller retains all rights and benefits from the capacity associated with the Generating Unit.

In ComEd's view, the law is well-established that the meaning of contract language must be ascertained by looking at the words used; a court or agency cannot interpret a contract in a way which is contrary to the plain and obvious meaning of those words. (ComEd Initial Brief at 4-5, citing J.M. Beals, Inc. v. Industrial Hard Chrome, Ltd., 194 Ill. App. 3d 744, 748 (1st Dist. 1990). ComEd argues nor can the clear terms of a contract be rewritten to provide a better bargain to suit one of the parties. (Id., citing Cress v. Rec. Servs., Inc., 341 Ill. App. 3d 149, 187 (2nd Dist. 2003). ComEd asserts a party's claim that it "intended" or "believed" the contract to mean something other than it plain language is absolutely barred by the parol evidence rule. (Id., citing Air Safety, Inc. v. Teachers Realty Corp., 185 Ill. 2d 457, 462 (1999), citing Eichengreen v. Rollins, Inc., 325 Ill. App. 3d 517, 521(2001).)

ComEd insists the plain language of the contracts call for the LTPPAs Annual Contract Quantity of "Product," – that is, "both the energy and the associated REC" – to be "reduc[ed] proportionately" if the cost cap is exceeded. ComEd believes the RS' proposal would require the Commission to unlawfully delete some words ("both the energy and"), and add others to the LTPPAs ("and includes only the associated REC"). (ComEd Initial Brief at 5)

According to ComEd, to the extent the RS point to the "unless otherwise directed by the Illinois Commerce Commission or statute" language in item (2) of the Sample Confirmation quoted above and claim this somehow permits the Commission to modify the material terms of the LTPPAs, that position is untenable and would be illegal. ComEd says the Commission only has those powers given it by the legislature through the Act. (ComEd Initial Brief at 6, citing Business & Professional People for the Public Interest v. Illinois Commerce Comm'n, 136 Ill.2d 192, 201 (1989); see also People ex rel. Ryan v. Illinois Commerce Comm'n, 298 Ill.App.3d 483, 487 (2nd Dist. 1998) ("The Commission derives its power from the statute and only has the authority that is expressly conferred upon it."). ComEd argues that nothing in the PUA or IPA Act authorizes the Commission to modify approved wholesale energy contracts between private parties after the fact. (Id.)

ComEd also contends such an argument would be contrary to the intent and scope of the statutory language, which is specifically directed to how a curtailment shall be implemented when there are multiple LTPPAs. ComEd asserts the statement "unless otherwise directed by the Illinois Commerce Commission or statute," establishes a contingency on how "Product" as a whole – e.g., energy and RECs – is to be reduced across multiple LTPPAs if the rate cap is triggered. ComEd states that in the event the rate cap was triggered, instead of curtailing the LTPPAs to reduce Product on a *pro rata* basis, the Commission could elect to reduce Product within the highest-priced contracts first. ComEd insists that nowhere does the agreement authorize the Commission to redefine what constitutes "Product." According to ComEd, the term "Product" is defined separately from the provisions regarding curtailment, affording no discretion in interpreting the components that comprise the "Product." Had the parties intended to make the definition of "Product" susceptible to modification, ComEd asserts the contract would have stated as much. (ComEd Initial Brief at 6-7)

In ComEd's view, while the Commission need not look any further than the agreement itself to decide the issue, numerous sources confirm that the LTPPA curtailment provisions apply to a bundled product. ComEd asserts that during the time that the LTPPAs were being developed, it was reiterated time and again that the LTPPAs were for a bundled product – both renewable energy and RECs. ComEd claims this fact was confirmed over the course of numerous workshops, bidder information calls, and bidder information workshops. ComEd states that in explaining the curtailment provisions to bidders at the September 8, 2010 Bidder Information Session, bidders were informed that in the event Buyer cannot recover costs the annual contract quantity and applicable percentage are reduced on *pro-rata* basis. ComEd notes bidders were required to submit a single price for both energy and RECs; and, it was well-established that utilities would only make a single payment of energy and RECs upon delivery. ComEd insists bidders were told that Product is for RECs and Renewable Energy. (ComEd Initial Brief at 7)

ComEd says the Commission itself has endorsed this approach. In Docket No. 09-0373, ComEd states the Commission specifically stated that the Product to be curtailed includes both RECs and energy. In that same proceeding, ComEd says the

Commission also concluded that the IPA's proposal for the procurement process to be on a bundled basis, for both energy and the RECs generated from the project will potentially benefit utility customers; the proposal should be approved. In ComEd's view, there is no reasonable basis for the Commission to alter its decision in Docket No. 09-0373. (ComEd Initial Brief at 7-8)

ComEd argues that in approving the LTPPAs four years ago, both the IPA and the Commission recognized that over the course of these multi-decade contracts, the potential existed for the contract volumes to be greater than what could be supported by ComEd's retained load. According to ComEd, this is precisely why the LTPPAs contained such curtailment provisions. ComEd says Public Act 096-0176, the statute authorizing municipal aggregation in Illinois, was signed into law more than a year prior to the time the LTPPAs at issue were executed. ComEd suggests the RS only had to look two states away to Ohio to see the potential impacts of municipal aggregation on utility load. (ComEd Initial Brief at 8)

ComEd states that in a publicly-available response to FAQ-198, the Procurement Administrator specifically noted that the RRB will vary to the extent that sales to eligible retail customers vary, either because the load of these customers vary (for example because of customer migration) or because the price paid by these customers vary (for example because of changes in energy prices. ComEd says each bidder could make its own assumptions regarding how the RRB may vary in the future. (ComEd Initial Brief at 9)

ComEd says while the RS may have hoped for greater revenues, the contract language clearly spells out the options the RS may pursue if their contract is curtailed; none of which include curtailing RECs only. ComEd contends that as was made clear to the RS from prior to submitting bids, renegotiation of the LTPPAs is not permitted, which is what ComEd claims the RS are now trying to accomplish. (ComEd Initial Brief at 10)

According to ComEd, the primary financial impact of the RS' primary proposal is the harm it would do to eligible customers; the needless increase in costs it would impose on customers above and beyond the costs determined in the approved market-based procurement process. ComEd asserts that the RS' proposal would simply shift the risk of current and future load shifting from the RS – who willingly accepted such risk – to ComEd and AIC-supplied customers. ComEd claims this is not just an extra layer of cost not appropriately borne by retail customers, it is imposing an added layer of cost on those customers for a risk they have already paid once to have the RS bear. ComEd insists that ComEd and AIC customers have already paid a premium to the RS to accept or manage this risk in the agreed-to fixed price contained in the LTPPAs. ComEd complains that the RS' primary proposal would force customers to unnecessarily pay the relevant year's energy price from the 2010 forward energy price curve, which the RS do not dispute is higher than the day-ahead LMPs. ComEd believes the contract terms should not be re-written now to force utility customers to pay a second time for this risk. (ComEd Initial Brief at 10-11, Reply Brief at 4-5)

ComEd asserts the RS' primary proposal also makes bad business sense as it cuts against the integrity of the contracting process in Illinois procurements. ComEd says bidders submitted prices reflecting an expectation that the LTPPA provisions were non-negotiable and that winning suppliers would bear the risks associated with those provisions. According to ComEd, contrary to the RS' claims, those risks clearly included the risk of curtailment due to customer migration. ComEd claims rewriting these provisions now would not only be fundamentally unfair to losing bidders who played according to the rules, but would also cause confusion and uncertainty for bidders in future requests for proposal by sending a signal to the market that agreed upon terms and conditions may be disregarded after the fact. ComEd believes this added uncertainty would ultimately cause additional harm to customers as bidders incorporate risk premiums into their bids to account for such uncertainty. (ComEd Initial Brief at 11, Reply Brief at 6)

ComEd notes the RS contends its primary proposal will not harm utility customers because customers would not pay more for RECs than allowed by the statutory rate cap. In ComEd's view, this is an untenable definition of harm. ComEd believes customers are harmed if they pay more than they are justly obligated to for resources that they do not even need. ComEd says the claim that imputed REC costs would be within the statutory cap would only mean that the maximum amount legislatively permitted has not been exceeded, not that customers have not been harmed by rewriting the LTPPAs. (ComEd Reply Brief at 2-3)

ComEd says the statutory language of the IPA Act provides for a limit on the impact of procuring renewable energy resources:

> Notwithstanding the requirements of this subsection (c), the total of renewable energy resources procured pursuant to the procurement plan for any single year shall be reduced by an amount necessary to limit the annual estimated average net increase due to the costs of these resources included in the amounts paid by eligible retail customers in connection with electric service to …, [for each year after 2011], no more than the greater of 2.015% of the amount paid per kilowatthour by those customers during the year ending May 31, 2007 or the incremental amount per kilowatthour paid for these resources in 2011.

ComEd claims the RS ignore that the statutory language specifically refers to and requires a reduction of the renewable energy resources ("RERs") that would otherwise be procured to stay within the statutory rate impact cap for eligible retail customers. ComEd insists the statute nowhere provides that the procurement of the REC component of an RER must be separately or independently reduced or curtailed for RERs that provide both energy and its associated REC. (ComEd Reply Brief at 2-3)

According to ComEd, the phrases "renewable energy resources" and "renewable energy credit" are clearly defined in the IPA Act:

> "Renewable energy resources" includes energy and its associated renewable energy credit or renewable energy credits from wind, solar thermal energy, photovoltaic cells and panels, biodiesel, anaerobic digestion, crops and untreated and unadulterated organic waste biomass, tree waste, hydropower that does not involve new construction or significant expansion of hydropower dams, and other alternative sources of environmentally preferable energy.
>
> "Renewable energy credit" means a tradable credit that represents the environmental attributes of a certain amount of energy produced from a renewable energy resource.

ComEd states that here, the "renewable energy resource" procured under the LTPPAs is a single product that includes "both the energy and the associated REC." (ComEd Reply Brief at 3-4)

ComEd contends the RS attempts to confuse the issue by noting that whether the renewable resources budget is exceeded is determined with respect to the value of RECs procured. ComEd says while this accurately describes the math used to assess statutory compliance, the clear intent of the legislation, and LTPPA contract terms, is to insure that the total impact of renewable energy resources (both energy and RECs) is less than the 2.015% specified in the law. ComEd claims that is why the amount of RERs procured in any given year is to be reduced by the amount needed to limit the annual estimated average net increase due to the costs of these resources included in the amounts paid by eligible retail customers in connection with electric service to the prescribed limits. In ComEd's view, the RS wrongly equates the protection provided by the statutory rate impact cap to a limit on the amount paid for RECs. ComEd insists the protection provided by the law is a limitation on the obligation to purchase and pay for RERs where the inclusion of those RERs would cause the statutory rate impact cap to be exceeded. (ComEd Reply Brief at 4)

ComEd says the RS argues that unless existing suppliers' payments are sweetened, the renewable future will be harmed. ComEd asserts there is no economic reason for this: the revenues of future development will be governed by future agreement. ComEd agrees with the IPA that the RS' primary proposal may help the individual LTPPA counterparties, the owners of now existing renewable generation, but does little to provide incentives for new renewable development in Illinois as claimed by the RS. In ComEd's view, the RS' claim appears to be little more than an unsubstantiated scare tactic. (ComEd Reply Brief at 5)

ComEd notes the RS asserts that it could not have assessed the risk of curtailment and, therefore, should not be responsible for its assessment of that risk. ComEd argues that even if one disregards that bidders did, in fact, assume the risk of curtailment under the terms of the LTPPAs, this argument hardly can support saddling customers with this risk. In ComEd's view, between suppliers and customers, the suppliers are in a far better position to assume, price for, and hedge against curtailment risk. ComEd claims this is precisely why the language of the LTPPAs places this risk on the suppliers rather than customers. ComEd maintains relevant examples of this risk were available to the RS and specific notice of such risk was provided by the IPA's Procurement Administrator. ComEd says the RS' own documents reflect that such risks were well understood at the time Suppliers entered into the LTPPAs. ComEd believes no reasonable basis exists for now transferring this risk from suppliers to eligible retail customers. (ComEd Reply Brief at 6-7)

## VII. AMEREN'S POSITION

According to Ameren, on rehearing, the Commission must determine if post execution alterations to the settlement provisions of LTTPAs outside of a competitive bid process is permissible under the governing statutes, and whether the Commission may as a general matter approve a procurement plan that includes compensation to suppliers that has not been established through a competitively bid process. (Ameren Initial Brief at 7, Reply Brief at 1)

Ameren asserts that the RS' first proposal will result in higher costs to eligible retail customers under a scenario where the RS would otherwise incur lost revenues associated with an energy curtailment. Ameren argues that because the energy portion of the LTPPAs is outside the calculation of the RRB, the primary proposal of the RS would hold eligible retail customers responsible for the "shortfall of revenues" that the RS allege are harming their interests. Ameren suggests the problem could become worse in the future, as the advent of municipal aggregation has resulted in the majority of customers switching away from utility bundled supply which leaves the cost responsibility for the LTTPAs with the eligible retail customers that remain. Assuming the costs of the LTPPAs remain higher than the current market, Ameren says the higher costs incurred by eligible retail customers under the primary proposal could then lead to further switching and greater concentration of costs on an ever smaller pool of eligible retail customers. While Ameren believes such a scenario to be relatively remote, given the possibility of a substantial negative outcome, Ameren believes the Commission should give the potential problem due consideration. (Ameren Initial Brief at 7-8)

With respect to the RS' primary position, Ameren asserts that the procurement process requires benchmarking on prices paid for energy and also the use of sealed bids for selection of contracts based on price. Ameren says the procurement plan is constrained by statutory requirements contained in Section 16-111.5(e) of the PUA that requires standard contracts be used, which are not subject to negotiation by winning bidders. Ameren notes the IPA emphasizes the importance of treating all bidders the same and procuring power based on price alone. According to Ameren, the plan requires the establishment of benchmarks prior to approval by the Commission. From a legal standpoint, Ameren believes the RS' primary proposal casts a questionable shadow given that the proposed modifications occur after the benchmarking process and after contract execution. To the extent the first proposal is deemed appropriate by the Commission, Ameren wishes for the ruling to be made with respect to this plan year only, so that future negative impacts on eligible retail customers may be avoided, and in addition, believes the Commission should approve a settlement methodology since none is contemplated under the executed LTTPAs. (Ameren Initial Brief at 8-9)

Ameren believes the legality of the RS' proposal is at best legally uncertain. With respect to the primary proposal, Ameren has substantial concern that the relief requested would violate the detailed procurement process provided for by Illinois law. (Ameren Reply Brief at 1, citing Section 16-111.5 of the PUA) With respect to new facts and arguments raised on Rehearing, AIC does not believe the substance of the record has changed from the underlying proceeding so as to justify a modification to the Final Order. To the extent the Commission finds in favor of the RS, AIC continues to recommend the alternative proposal be accepted because it leaves previously executed contractual arrangements in place, while also avoiding incremental charges for eligible customers. (Ameren Reply Brief at 1-2)

According to Ameren, the fact is that paying for the RS' lost revenues under the primary proposal does not come free and the eligible retail customers would be responsible for such costs. Ameren says the RS alleges that the eligible retail customers are not harmed because the RPS budget would not be exceeded. Ameren claims the RS fail to acknowledge that the RPS budget only includes the dollars associated with the REC portion of the LTPPAs, whereas the dollars associated with the energy portion of the LTPPAs are not included in the RPS budget. In Ameren's view, the focus on the RPS budget issue therefore diverts attention from the key issue which is that the energy portion of the LTPPAs currently contains an “out of the money” hedge from the perspective of the eligible retail customers and the RS logically expects this to continue for the foreseeable future. Ameren believes if the Commission adopts the primary proposal, eligible retail customers would incur higher costs associated with modified LTPPAs when compared to a scenario of energy curtailment under the currently operating LTPPAs. (Ameren Reply Brief at 2-3)

With respect to the alternative proposal of the RS, Ameren believes the use of ACP related funds to purchase curtailed RECs could be a preferable option if the Commission desires to address the RS' alleged shortfall of revenues. Ameren states the proposal would not result in higher costs for any customers since funds previously collected from Ameren's hourly customers would be used at this time. (Ameren Initial Brief at 9)

Ameren says the RS' alternative also requests relief from RERF. Ameren believes the Commission has already determined that decisions associated with RERF reside solely with the IPA. Ameren also says the IPA has been clear in this rehearing that the proposal to use RERF in this manner is not acceptable. (Ameren Reply Brief at 3-4)

Ameren believes legal uncertainty remains with this alternative proposal as well, but due to the lack of impact on the costs to present customers, Ameren believes this alternative proposal is preferable to the extent the Commission determines that the RS' request is appropriate. (Ameren Initial Brief at 9, Reply Brief at 4)

Ameren agrees with the IPA that the clear language of the PUA prohibits the renegotiation of contractual terms by winning bidders, and further that the policy that underpins the PUA's language could be seriously impacted by a proposal that essentially allows winning bidders to revisit agreed upon language after the bidding process has concluded. Ameren maintains that it is legally untenable to essentially redefine, modify, or construe a procurement contract in light of the clear language of the applicable enabling legislation. (Ameren Reply Brief at 4-5)

In Ameren's view, from a policy perspective, it is illogical to augment a standardized procurement agreement used in a competitive bidding process after the winning bidders are chosen, because it is quite possible the other parties would have bid lower prices had they known of the revised contractual provisions. Ameren says prospectively, it is problematic to send the message to future bidders that standard contracts may be changed post-bidding as some bidders may alter or hedge their bidding practices with the expectation of further revision to contractual provisions. (Ameren Reply Brief at 5)

## VIII. COMMISSION'S ANALYSIS AND CONCLUSIONS

Articles VIII and XVI of the PUA, along with the IPA Act, govern the IPA's and the Commission's obligations regarding energy efficiency. As a State Agency, and subject to the other provisions in the statutes, the Commission has an obligation to strive to achieve the energy efficiency goals adopted by the Illinois General Assembly in Section 8-103 of the PUA. As a result, the Commission appreciates the input and effort of the parties on this important issue.

The RS' primary proposal is that the Commission should direct that, in the event it is determined that a curtailment of purchases is required to avoid exceeding the renewable portfolio standard rate caps, only purchases of renewable energy credits under the LTPPAs should be curtailed, rather than both energy and the associated RECs. This primary proposal is opposed by all other parties that provided input on rehearing.

The RS contends that its primary proposal will not harm utility customers. The RS argues the appropriate comparison for determining whether utility customers are harmed by the RS' primary proposal is a comparison of what customers pay if there is no curtailment versus what they pay under the proposal if there is a curtailment. The RS claims the utility’s customers are charged the same price for the energy associated with curtailed RECs as they are charged for the energy associated with RECs that are not curtailed.

Staff, ComEd, and Ameren believe the RS' primary proposal will harm utility customers and should, therefore, be rejected. They argue that under the RS' primary proposal, the utilities will be required to purchase energy from the LTPPA suppliers at prices that exceed the market price of energy. Because these higher energy costs would be passed on to the utilities' customers, they believe customers are harmed.

ComEd also asserts that the RS' proposal would simply shift the risk of current and future load shifting from the RS onto utility-supplied customers. ComEd claims this is not just an extra layer of cost not appropriately borne by retail customers but, it is imposing an added layer of cost on those customers for a risk they have already paid once to have the RS bear. ComEd insists that utility customers have already paid a premium to the RS to accept or manage this risk in the agreed-to fixed price contained in the LTPPAs. ComEd believes utility customers should not be required to pay a second time for this risk.

The RS argues that it could not reasonably have foreseen the level of customer switching which resulted from municipal aggregation. This argument is disputed by the IPA, Staff, ComEd, and Ameren.

Among other things, the parties opposed to the RS' primary proposal argue that it would require the Commission to effectively modify the terms of the LTPPAs. Some of those parties argue that the Commission lacks the authority to unilaterally modify the terms of the LTPPAs. All of those parties appear to agree that, even if the Commission possessed the authority to unilaterally modify the terms of the LTPPAs, it should not do so. Those parties believe that unilaterally modifying the terms of the LTPPAs would not be beneficial to the eligible retail customers of ComEd or Ameren. They also believe that unilaterally modifying the terms of the LTPPAs would establish a dangerous precedent under which bidders in future procurement processes could not be assured that contracts previously entered into would be sacrosanct or non-negotiable.

In its Reply Brief, ComEd argues that Section 1-75(c) of the IPA Act explicitly requires that any curtailment required to stay with in the statutory rate impact cap be of "renewable energy resources" and that the IPA Act defines renewable energy resources to include energy and its associated renewable energy credit. In essence, ComEd argues that the RS' primary proposal is barred by the IPA Act.

As the Commission understands it, the RS essentially argues that it is not asking the Commission to modify the terms of the LTPPAs. Instead, the RS argues that it is asking the Commission to modify the method of implementing any curtailments under the provisions of the LTPPAs. The RS believes the appropriate method for implementing curtailments did not receive the attention in Docket No. 12-0544 that it is receiving in this case, and it is the purpose of this rehearing to determine if a different method of implementing curtailments should be adopted.

It appears to the Commission that both the record and arguments on rehearing are more complete than in the initial phase of this proceeding or in Docket No. 12-0544. Nevertheless, the decision on this issue is difficult. Despite the RS' protestations to the contrary, it is clear to the Commission that bidders on the LTPPAs should have known about the possibility of customer switching and curtailments. That is precisely one reason why the curtailment provisions were included in the LTPPAs.

The Commission is sympathetic to the LTPPA suppliers and the possibility that they may have underestimated the degree of customer switching in Illinois and the associated probability and/or magnitude of potential curtailments. Nevertheless, this is the textbook definition of risk and the LTPPA suppliers accepted that risk by entering into the LTPPAs. As a result, the Commission rejects the RS' proposed method of evaluating harm to utility customers in favor of the method endorsed by Staff, ComEd, and Ameren.

Staff, ComEd, and Ameren assert that utility customers will be harmed under their proposed method of evaluating customer harm. It appears to the Commission that in the short-term that is almost certain. What is not entirely clear is whether customers will be harmed over the entire term of the LTPPAs.

Before addressing that question, the Commission will turn to whether the RS' primary proposal would constitute modifying the terms of the LTPPAs. Having reviewed the parties' filings in this proceeding, it is clear to the Commission that it was explicitly intended that the IPA would acquire a bundled product of energy and RECs when it procured long-term renewable resources. Additionally, it is clear that the curtailment provisions of the LTPPAs explicitly call for the possible curtailment of "Product" purchased under the LTPPAs. It is also clear that the definition of "Product" explicitly includes both energy and the associated RECs.

While the Commission fully understands and appreciates the RS' position with regard to this issue, the Commission concludes that adopting the RS' primary proposal would constitute a modification of the LTPPAs. For the many reasons identified by the IPA, Staff, ComEd, and Ameren, the Commission finds that unilaterally modifying the LTPPAs is not in the public interest. Given this conclusion and the fact that it is not clear that utility customers will not be harmed by the RS' primary proposal, the Commission declines to adopt the RS' primary proposal.

The RS' secondary, alternative proposal is that curtailed RECs should be purchased by the utilities, using their accumulated balance of funds from assessing the ACP rate to their customers served on hourly pricing tariffs and by the IPA, using funds in the IPA RERF, at prices equal to the Contract Prices under the LTPPAs less the DAH-LMPs. The RS asserts its secondary proposal will not harm utility customers and preserves the customer protections of the rate caps.

The IPA endorses the RS' alternative proposal as long as that alternative proposal is limited to use of the utility-held hourly customer ACP funds. While ComEd and Ameren say very little about the RS' alternative proposal, it is not clear that they support it. While he says relatively little about the alternative proposal, it appears that Staff witness Zuraski opposes the RS' alternative proposal because he believes it would increase costs to utility customers. (See ICC Staff Exhibit 1.0 on Rehearing at 3-4) If the Commission approves the RS' secondary, alternative proposal, then Staff recommends that any costs incurred by the utilities in excess of the budgeted amount be paid for with ACP funds already collected from hourly-priced customers.

Having reviewed the parties' filings on rehearing, the Commission finds that the RS' alternative proposal, modified to include only the ACP funds already collected by ComEd and Ameren, is reasonable, will not harm utility customers, is in the public interest, and should be adopted. The Commission believes it is necessary to modify the RS' alternative proposal to recognize the fact that the Commission does not have authority over the IPA's use of the RERF.

Unlike its primary proposal, there is no indication that the RS' alternative proposal would require any unilateral modification of the LTPPAs. Additionally, that alternative proposal, as modified, does not appear in anyway inconsistent with the provisions of the PUA or IPA Act. Staff is correct that RS' alternative proposal could cause the utilities' to incur additional costs because the price for curtailed RECs could increase. Because the source of paying for any potential additional costs is ACP funds already collected, it does not appear it would impose incremental costs on utility customers. The Commission finds that the record does not support a finding that the RS' alternative proposal, as modified, would harm utility customers. As noted above, the Commission has an obligation to, and is devoted to, achieving the energy efficiency goals adopted by the Illinois General Assembly in Section 8-103 of the PUA, subject to the other provisions in the statutes. The Commission finds that adopting this proposal is a reasonable step to encourage the use and development of renewable resources in Illinois and is in the public interest.

The Commission notes the IPA recommends the alternative proposal be approved only if the Commission approves a methodology for implementing the proposal to ensure each LTPPA counterparty is properly compensated. The RS proposes that assuming a curtailment were declared for a year, the utility's accumulated balance of hourly ACP funds at the start of the year (June 1) would be used to purchase curtailed RECs during the ensuing year. The RS says at the start of the year, the utility's accumulated balance of hourly ACP funds would be allocated pro rata to the LTPPA suppliers based on the Annual Contract Quantity of each supplier's LTPPAs to the aggregate Annual Contract Quantity of all the utility's LTPPAs. Going forward into the year, the RS proposes for each supplier's allocated portion of the hourly ACP balance to be used to purchase the full amount of that supplier's curtailed RECs in each month, until that supplier's portion is exhausted. If a supplier's allocated portion of the hourly ACP funds is exhausted by the purchase of curtailed RECs from that supplier before the end of the year (May 31), the RS says that supplier can sell any remaining curtailed RECs for the remainder of the year to the IPA.

In terms of the settlement mechanics of the utility's purchase of curtailed RECs from a LTPPA supplier, the RS proposes for the utility to simply settle with the supplier each month for the curtailed RECs purchased with hourly ACP funds on the basis of the same price data used to settle the non-curtailed part of the LTPPAs, i.e., the LTPPA Contract Price less the Day-Ahead Hourly LMPs in that month.

The IPA indicates that the RS' implementation proposal appears to take into account the questions raised by the IPA and Staff and the IPA has no objection to the Commission adopting this methodology. The Commission notes that no party objected to the RS' proposed implementation methodology in its briefs. The Commission concludes that the RS' proposed implementation methodology for the RS' modified alternative proposal adopted herein is reasonable and should be adopted.

## IX. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record, is of the opinion and finds that:

(1) ComEd and AIC are Illinois corporations engaged in the retail sale and delivery of electricity to the public in Illinois, and each is a "public utility" as defined in Section 3-105 of the PUA and an "electric utility" as defined in Section 16-102 of the PUA;

(2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;

(3) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(4) the Commission finds that curtailed RECs should be purchased by the utilities, using their accumulated balance of funds from assessing the ACP rate to their customers served on hourly pricing tariffs, at prices equal to the Contract Prices under the LTPPAs less the DAH-LMPs, using the implementation methodology proposed by the Renewable Suppliers in its rebuttal testimony;

(5) except as specifically modified herein, the Commission's December 18, 2013 Order in this proceeding should be affirmed;

(6) subject to the modifications adopted in the prefatory portion of this Order as well as the modifications adopted in the Commission's December 18, 2013 Order, the Plan filed by the IPA pursuant to Section 16-111.5 of the PUA should be approved; as modified, the Plan, and load forecasts found appropriate in this proceeding, will ensure adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability; in making this finding, the Commission is not expressing its concurrence in every statement or opinion contained in the Plan and no presumptions are created with respect thereto.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that subject to the modifications adopted in the prefatory portion of this Order as well as the modifications adopted in the Commission's December 18, 2013 Order, the Plan filed by the Illinois Power Agency pursuant to Section 16-111.5 of the Public Utilities Act is hereby approved, as are the load forecasts found appropriate in this proceeding.

IT IS FURTHER ORDERED that Finding (4) above shall be followed by the appropriate parties.

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceeding which remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that except as specifically modified herein, the Commission's December 18, 2013 Order in this proceeding is hereby be affirmed.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED: May 12, 2014

Michael L. Wallace
Chief Administrative Law Judge

Briefs on Exceptions due May 23, 2014.
Reply Briefs on Exceptions due June 2, 2014.